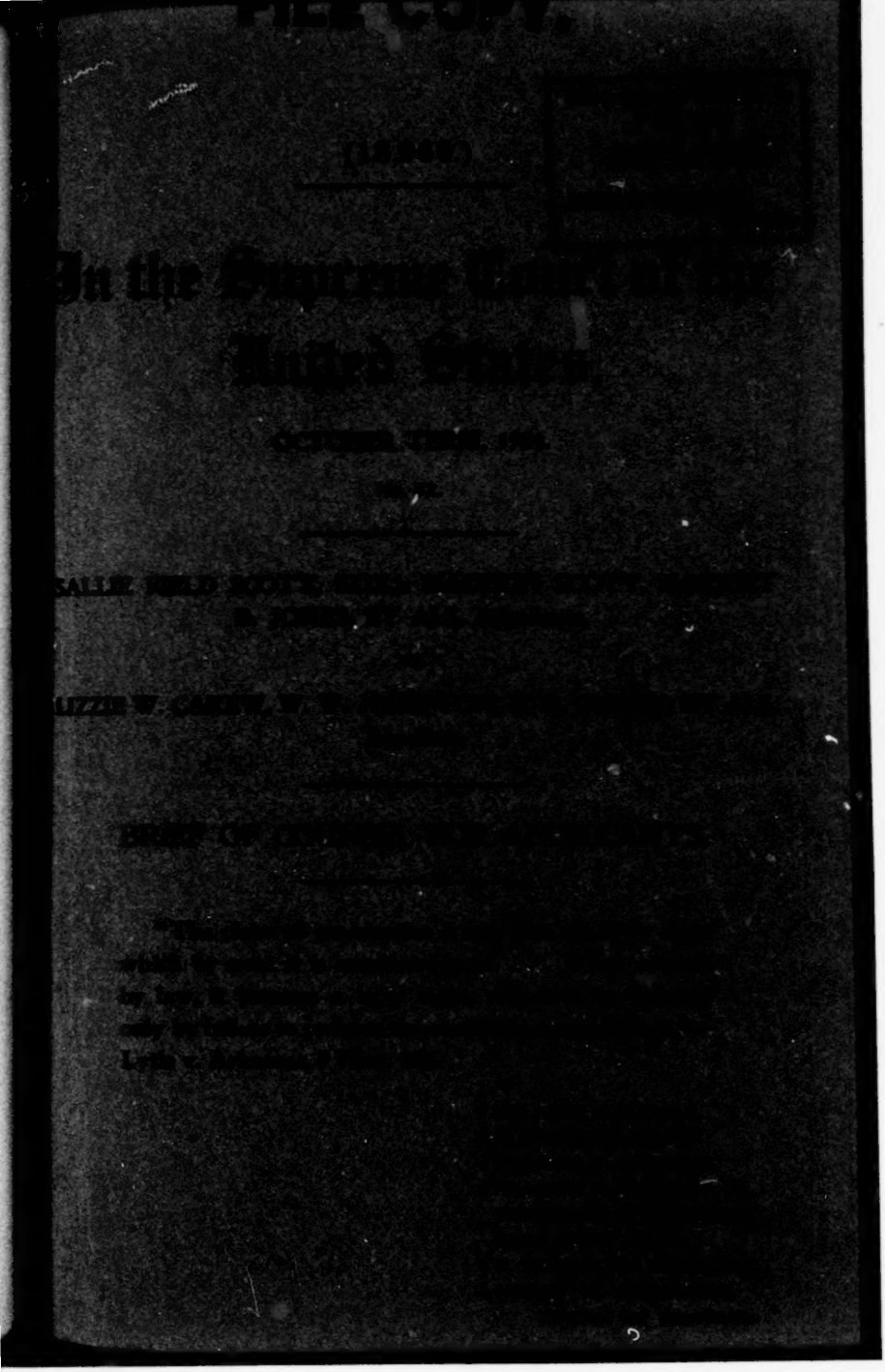

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18,966.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT; ELIZA MADISON SCOTT; HARRIET B. JONES; FREEMAN JONES; LUCIA BEVERLY BERNARD; HUGH S. MORRISON; HACKLEY MORRISON; ELIZABETH MADISON MORRISON; MARIA HACKLEY; MARY HACKLEY; SALLIE HACKLEY; MARY F. HACKLEY; SALLIE STRACHAN HACKLEY; ALEXANDER S. HACKLEY; GERTRUDE HACKLEY; THOMAS H. HACKLEY, AND STEPHEN P. HACKLEY,

vs.

LIZZIE W. CAREW; W. W. HAMPTON; E. R. GUNBY; M. G. GIBBONS; M. M. NELSON; E. C. BEACH; S. Y. FINLEY, AND GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANTS.

This case stands upon appeal from a decree entered in the United States Circuit Court of App als for the Fifth Circuit, March 24, 1903 (R. Star, p. 96), affirming, with costs, the decree of the Circuit Court of the United States for the Southern District of Florida, entered February 7, 1902 (R. Star, p. 88), sustaining demurrers and dismissing the bill of complaint.

In order to avoid repetition, we will state here that the references in this brief to pages are to pages of the record from the court below which constitutes the star pages in the record as printed in this court, unless otherwise stated.

The cause was heard in the Circuit Court upon the bill, and

exhibits filed therewith and demurrers thereto filed by the defendants, the appellees in this court.

The appellants claim that, as heirs-at-law of one Robert J. Hackley, deceased, a pre-emption claimant under the act of April 22, 1826 (4 Stats., 154), they are the equitable owners of a certain tract of land in Hillsborough county, Florida, which was formerly a part of the Fort Brooke Military Reservation.

The appellees claim said land under a patent issued by the United States.

The purpose of this suit is to have the defendants decreed to hold "the legal title of said land in trust for the complainants," and to be required to "convey said land to the complainants"; also, to require defendants to account to the complainants for the proceeds of any of the lands which may have been sold, said account to be "upon such terms and conditions as may be agreeable to equity."

STATEMENT OF THE CASE.

The claim of the complaints is based upon the Act of Congress of April 22, 1826 (4 Stats., 154). The first section of that act reads as follows:

> "That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions, and regulations, in every respect, as are directed by the act, entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen; *Provided*, That no person shall be entitled to the provisions of this section who claims any tract of land in said Territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

The Act of February 5, 1813 (2nd Stats., 797), "whose terms, restrictions, conditions, provisions and regulations in every respect" are made a part of said Act of 1826, reads as follows:

"That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price, and on the same terms and conditions in every respect as are, or may be provided by law, for the sale of other lands sold at private sale in said Territory, at the time of making such purchase; *Provided,* That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run, or to be run,* under the direction of the Surveyor-General for the division of the public lands; *Provided also,* That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act. (Italics ours.)

"SEC. 2. *And be it further enacted,* That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office, for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the Register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the Register of the Land Office, on producing his receipt from the Receiver of Public Moneys for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale; *Provided,* That all lands to be sold under this act shall be entered with the Register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies: and

every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the Register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

The bill alleges, in substance (Record, p. 5, *et seq.*), that Robert J. Hackley, the ancestor of complainants, who was over twenty-one years of age and the head of a family, in November, 1823, settled upon, inhabited and cultivated the land in controversy, and erected a substantial dwelling-house thereon. That the land was not rightfully claimed by any other person at the time of the passage of the Act of 1826 or before; that Hackley never claimed any other land in Florida by virtue of confirmation by commissioners under act of Congress, and that he continued to reside in Florida until his death, in 1845; that in February, 1824, a detachment of United States troops, under Colonel Brooke, in connection with the Indian troubles, took possession of the house and land occupied by Hackley and settled a camp or cantonment thereon; that troops continued to occupy the same until December 10, 1830, when, "by executive order of the President of the United States," the Fort Brooke Military Reservation was established, containing sixteen square miles of land, embracing the above-mentioned tract of land, which had been settled and occupied in 1823 and 1824 as aforesaid. That the said military reservation was thereafter from time to time reduced by executive order, until on June 1, 1873, it embraced but 148.11 acres, being the land described in the bill, known as the "Reduced Fort Brooke Military Reservation," which reservation was relinquished and transferred by the Secretary of War to the Interior Department on January 4, 1883. That the Land Office in St. Augustine, in which jurisdiction the land in controversy was located, was first established by executive order in 1828.

That in 1835, the said land not then having been surveyed, Hackley filed with the Register of said Land Office evidence designating the tract claimed and proof of his settlement, and asserted his claim of pre-emption in the purchase thereof.

That after the changing of the boundaries of the land districts in Florida, so that the said land became in the jurisdiction of

On page 5, line 30, after words "Robert J. Hackley," insert the following:

"The proceedings before the Commissioner of the General Land Office on appeal, which resulted in a decision on December 10, 1890, in favor of the complainants, the heirs of Robert J. Hackley."

the Land Office at Newmansville, Hackley again, in 1843, filed his proofs and renewed his said pre-emption claim in said Land Office, and that he continued to assert his right until his death, in 1845, since which time it has been prosecuted by his heirs. That on March 6, 1883, the General Land Office prepared and submitted to the local Land Office at Gainesville an approved diagram of the official survey of the said reduced Fort Brooke Military Reservation into seven lots, containing in all 148.11 acres, which was received in said office at Gainesville on March 22, 1883; that on April 2, 1883, the Commissioner of the General Land Office suspended said diagram and directed the Register and Receiver to allow no entries upon any of the lands within said reservation, which suspension continued until final adjudication by the Secretary of the Interior.

That on September 26, 1887, T. H. Randolph, as administrator of the estate of R. J. Hackley, and on behalf of the legal representatives of said Hackley, filed in the Land Office at Gainesville a supplemental notice, or declaratory statement, of their claim to right of pre-emption in the purchase of said land, describing the same by the government surveys. That on October 14, 1887, said Randolph, in said capacity, renewed his said application for the right of pre-emption in the purchase of said land, and tendered the purchase-price thereof, which application was rejected by the Register, and the money tendered refused by the Receiver, holding that the land was not subject to entry. The land was never offered for sale.

The bill further shows the proceedings before the Register and Receiver of the local Land Office at Gainesville, Fla., which resulted in a decision, on December 10, 1890, in favor of the complainants, the heirs of Robert J. Hackley; the proceedings before the Secretary of the Interior, on appeal, which resulted in a decision, in 1892, in which the Secretary adopted the finding of facts made by the Register and Receiver and the Commissioner, but upon conclusions of law decided against the heirs of Hackley and all other claimants; the proceedings on review before the Secretary of the Interior, which resulted in a decision, on July 24, 1894, in which the Secretary of the Interior again approved the finding of facts, but upon conclusions of law decided against

the heirs of Robert J. Hackley, and awarded the lands in controversy to certain of the other claimants.

The bill further alleges that in 1896 a patent was issued, in accordance with the decision of the Department, to E. S. Carew for Lots 9 and 10, Sec. 24, T. 29, S. R. 18 E., containing 59.93 acres; all being a part of the land claimed by virtue of the original settlement of said Robert J. Hackley, and the provisions of the act of April 22, 1826. The remainder of said 148.11 acres was patented to other parties, but is not involved in this case. That in 1898 one Belbie and others filed a petition before the Interior Department, asking that suit be instituted to set aside said patents for fraud in the procurement thereof, which resulted in a decision of March 8, 1898 (R., 66), in which the Secretary refused to request the institution of said proceedings.

That Lizzie W. Carew, widow of, heir-at-law and sole beneficiary of the above patentee, has made conveyances to certain other parties, who are also made defendants to the bill, undertaking to convey certain portions of said lots to those defendants, and the bill alleges that said conveyances were without legal, valuable or real consideration, and that the grantees took with full notice of the rights of the complainants.

The bill then alleges that the complainants are the equitable owners of said land, and pray that the defendants may be decreed to hold the legal title in trust for the complainants, and may be required to convey the same; and that the defendants may also be required to account to the complainants for the proceeds of any part of said lands which may have been sold.

Copies of the following records were filed with the bill as exhibits and made a part thereof:

Exhibits A, B, C, D and DD, being affidavits of the settlement and improvement of the land in question by Hackley. Pages 21 to 24, inclusive.

Exhibits E and F, being the application of T. H. Randolph, administrator, to purchase said lands, with the endorsements of the Register and Receiver thereon, as heinbefore stated. Pages 25 to 26.

Exhibit G, being the decision of the Commissioner of the General Land Office, rendered December 10, 1890, containing the

finding of facts, and deciding in favor of the Hackley heirs. Pages 26 to 35, inclusive.

Exhibit H, being the decision of Secretary Noble, dated November 25, 1892. Pages 36 to 50, inclusive.

Exhibit J, being the decision of Secretary Smith, dated July 24, 1894. Pages 51 to 65, inclusive.

Exhibit K, being the decision of Secretary Bliss, dated March 8, 1898. Pages 66 to 74, inclusive.

To this bill, and the exhibits therewith, the defendants, other than S. Y. Finley, filed their joint and several demurrer, specifying fourteen grounds of demurrer, which will be found set out at length at pages 79 to 82; and S. Y. Finley filed his demurrer, specifying eight grounds of demurrer, which will be found set out at length at pages 83 and 84.

The grounds of demurrer stated by Defendant Finley are covered by specifications of demurrer filed by other defendants, with the exception of defence of laches, contained in the fourth specification thereof (p. 84).

For the sake of brevity, we will not attempt to set out in detail in the statement of the case the numerous grounds of demurrer specified, as each will be noticed in its proper place in the argument, and may be found by reference to the record, pages 79 to 84, inclusive.

After the demurrers were filed, and before the hearing thereon, the bill was amended, by leave of court, by inserting therein a more specific allegation of error in the construction of the law by the Secretary of the Interior. (See Record, p. 86.)

The several issues raised by the bill and exhibits, and the demurrers thereto, may be divided into two general classes, namely:

(1) Those issues which are technical in their character, and do not go to the merits of the case; and

(2) Those issues which go to the merits of the case, and raise the contention that there is no equity in the bill of the complainants.

Those specifications of demurrer which are technical in character and do not go to the merits of the case are substantially as follows:

(1) That there is no specific allegation of error of construction of law by the Land Department in the bill of complaint.

(2) That the bill presents mixed question of law and fact, which have become *res adjudicata* by departmental decision, and cannot be reviewed by a court of equity.

(3) That the bill, with amendments, is vague, insufficient and indefinite.

(4) That the bill does not show any fraud, knowledge of fraud, mistake or illegality on part of defendants.

(5) That defendants are *bona fide* purchasers for value without notice.

(6) That complainants are precluded from relief by laches.

(7) That the suit is barred by the Florida Statute of Limitations.

Those specifications of demurrer going to the merits of the case raise two general issues:

(1) Did Robert J. Hackley, or his legal representatives, acquire any right to or interest in the land in controversy under the act of 1826 by virtue of the settlement and cultivation thereof by said Hackley in 1823–'24, and the subsequent acts of said Hackley and his legal representatives? and—

(2) If said right or interest was acquired, has same been forfeited by the alleged failure of Hackley, or his legal representatives, to comply with the conditions subsequently imposed by the act under which they claim?

None of the technical objections to the bill were sustained by the Circuit Court.

The Circuit Court below, in its opinion, filed as a part of its order (R., p. 88), bases its decision, sustaining the demurrer, upon the *sole ground* that at the time of the passage of the act of April 22, 1826, the tract of land in controversy was "rightfully claimed" by "some other person," thus excepting it "from the right of *pre-emption which would otherwise have* attached" (italics ours); holding that the "person" so claiming this tract of land was the United States Government, by virtue of the occupancy thereof by a detachment of troops under the command of Colonel Brooke.

The language of the court, to the effect that the right of pre-

emption would have attached but for the fact that in its opinion the land, at the time of the passage of the act of 1826, was rightfully claimed by some other person, is in effect to overrule the other grounds of demurrer specified by the defendants.

An appeal (R., p. 91) was duly entered and prosecuted to the United States Circuit Court of Appeals.

The opinion of the United States Circuit Court of Appeals, rendered upon the appeal of the appellants from the decision and decree of the Circuit Court, reads in full as follows:

> "After a careful examination and consideration of the elaborate decisions of Mr. Secretary Noble, Mr. Secretary Smith, Mr. Secretary Bliss and Judge Locke, all found in the transcript, and all adverse to the claims of the appellants, and a study of the very able briefs filed by eminent counsel, we are of opinion that the Judge of the Circuit Court properly ruled in sustaining the demurrer to the complainants' bill, and therefore the judgment appealed from is affirmed." (R., p. 97.)

The decree of the Circuit Court of Appeals (R., 96) is to the effect "that the decree of said Circuit Court in this cause be, and the same is hereby, affirmed," with costs.

From this decree an appeal to this court (R., p. 102), with assignments of error (R., p. 98), was duly filed and allowed (R., p. 103).

ASSIGNMENT OF ERRORS.

I.

The court erred in affirming the decree of the Circuit Court, made and entered in this cause on the 7th day of February, 1902.

II.

The court erred in not making and entering a decree in favor of complainants and appellants against the defendants and appellees, and in not requiring the defendants and appellees to convey to the complainants and appellants the land described in the bill of complaint in this cause, as amended, and to account to the complainants and appellants in accordance with the prayers of said bill as amended.

III.

The court erred in not making and entering a decree that the complainants and appellants were the equitable owners of the property described in the bill of complaint as amended, and entitled to a conveyance of the legal title thereto.

IV.

The court erred in holding that the land described in the bill of complaint as amended was rightfully claimed, used and occupied and held by some other person in behalf of the United States at the time of the act of 1826 (the same being entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in the States of Alabama, Mississippi, and Territory of Florida"), so as to prevent the attachment of a right of pre-emption claimed in said bill of complaint as amended to have been granted by said act to Robert J. Hackley, the ancestor of the complainants and appellees.

V.

The court erred in sustaining the demurrer of the defendants and appellees to the bill of complaint as amended of the complainants and appellants.

VI.

The court erred in holding and adjudging that the defendants and appellees were entitled to recover costs herein, and said decree is erroneous in adjudging and decreeing that the defendants and appellees should recover of the complainants and appellants costs of this cause in said court, and that an execution might be issued out of the said Circuit Court therefor.

VII.

The court erred in dismissing the bill of complaint of the complainants and appellants, and the decree is erroneous in so ordering and adjudging.

ARGUMENT.

The attention of the court has been called, in the statement of the case, to the fact that the Circuit Court based its decision entirely upon the conclusion that the words "other person," as used in the act of 1826, embraced the military occupancy by the United States troops. It will also be seen that the Circuit Court of Appeals affirmed said decree of the Circuit Court in general terms, and gave no other reasons for its conclusions; yet, as we understand the status of this case before this court, even if this court be of opinion that the court below erred in its decision upon the point on which it sustained the demurrers, still it will look to all the grounds of the demurrers specified to find if, upon the whole case, the decision of the court was right or wrong. It becomes necessary, therefore, to argue the whole case before this court, and, after careful consideration, we have reached the conclusion that it can be most briefly and logically presented by a consideration of the points in their natural order, rather than by an attempt to meet at once the point raised by the court below in its opinion.

We will endeavor, therefore, to argue each of the points raised by the various specifications of demurrer, in their logical order, considering first those which go to the merits of the case; and, second, those which are technical in their character, and in the proper place will notice at length the point upon which the court below sustained the demurrers.

Even at the risk of some repetition, we will endeavor to so segregate our arguments upon the various points at issue as to enable the court to turn readily to the argument upon any one of the issues which it may desire to consider and examine.

Upon demurrer, of course all of the facts alleged in the bill are admitted, and exhibits filed with the bill are to be read as a part thereof.

> "In passing upon questions raised by the demurrers, the exhibits filed with the bill are to be read as a part of it, and the statements found in them must be accepted as true against the demurrants." (*Ulman* v. *Iaeger, et al.*, 67 Fed. Rep., 980, 982.)

With this principle in mind, let us examine the various demurrers to the bill.

PART I.

OF SPECIFICATIONS OF DEMURRER WHICH GO TO THE MERITS OF THE CASE.

PART I.

THE SPECIFICATIONS OF DEMURRER WHICH GO TO THE MERITS OF THE CASE.

The contention of the demurrants that the bills are without equity is based upon two general grounds, each of which embraces several points raised by the demurrers. These general grounds are:

1. That Robert J. Hackley, or his legal representatives, *never acquired* any right to, or interest in, the land in controversy by virtue of the settlement and cultivation thereof by Hackley in 1823–'24, and the subsequent acts of Hackley and his representatives.

2. That if Robert J. Hackley, or his legal representatives, ever acquired any right to, or interest in, said land, such rights or interests *have been forfeited* by the alleged failure of Hackley and his said representatives to comply with the requirements of the laws of the United States.

Our brief upon this branch of the case will be divided into two sections, treating these general propositions in the order named, and each of the grounds of demurrer assigned will be noticed in its proper place.

It is important, however, that the court should keep constantly in mind throughout the discussion of this case the distinctions between cases of this character and cases in which there is a contest between claimants of public lands and the United States, for the principles of law and the rules of construction governing cases to which the United States is a party are entirely different from those in which the contest is between private individuals, in which the government has no interest.

Thus in *Frisbee* v. *Whitney,* 9 Wall., 187, it is expressly held by the Supreme Court that a pre-emption right which is *not good against the United States* may confer upon the *bona fide* settler "a preference over *others* . . . which the land officers are

bound to respect"; and that "this right may be protected by the courts against the claims of other persons who have not an equal or superior right."

In the case at bar the title has passed from the United States forever, and the government is no longer interested in the controversy. It is a contest between private parties, in which the prior settlement of Robert J. Hackley, and the constant efforts of himself and his legal representatives for a period of seventy-five years to protect the rights and interests acquired by that settlement, are admitted, and in which the defendants, whose claims were not initiated until the lands were valuable and free from difficulties or dangers, are trying by technicalities to defeat rights founded upon prior settlement, made for the purpose of securing a home, when the country was a trackless forest, and the undertaking replete with danger and difficulty. In such a case the equities are all with the earlier settler, and the courts will recognize and establish his right, unless to do so would be to violate some settled rule of law.

SECTION I.

DID ROBERT J. HACKLEY OR HIS LEGAL REPRESENTATIVES ACQUIRE ANY RIGHT TO, OR INTEREST IN, THE LAND IN CONTROVERSY, BY VIRTUE OF THE SETTLEMENT AND CULTIVATION THEREOF BY SAID ROBERT J. HACKLEY IN 1823–'24, AND THE SUBSEQUENT ACTS OF SAID HACKLEY AND HIS LEGAL REPRESENTATIVES?

To answer this general inquiry involves the discussion of several of the most important points raised by the demurrers, and the construction of the statutes of the United States under which the complainants claim. It is necessary at the outset, therefore, to ascertain the rules by which those statutes are to be construed, and the contention of Hackley heirs thereunder.

I. Rules of Construction.

It is a canon of construction and interpretation of statutes that the courts must so construe the law as to effect the object designed by the Legislature, and to this end its provisions must be examined in the light of surrounding circumstances at the time of their enactment and of preceding history.

Thus, in *Sieman's Adm'r* v. *Sellers,* 123 U. S., 276, 285, the Supreme Court of the United States says:

> "No doubt the words of a law are generally to have a controlling effect upon its construction, but the interpretation of those words is often to be sought from the *surrounding circumstances* and *preceding history.*" (Italics ours.)

And, again, the same court says, in the case of *In re Ross,* 140 U. S., 453, 475:

> "It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of *attendant and surrounding circumstances.* To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations

of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the Legislature, and in the treaty by the contracting parties." (Italics ours.)

See also *Ross* v. *Borland,* 1 Peters, 654.
Edwards v. *Dorby,* 12 Wheat, 210.
Gibbons v. *Ogden,* 9 Wheat, 1.

The statutes which the court will be called upon to construe, and under which the complainants claim, were passed more than seventy-five years ago, when the conditions and circumstances were entirely different from those now existing, or such as have existed for many years past. It is essential, therefore, to a proper construction of these statutes and an intelligent adjudication of the questions at issue, that we should review briefly the history and development of the public land system and the legislation bearing thereon; and examine the "surrounding facts and circumstances" existing at the time of the enactment of this statute.

Smith v. *Townsend,* 148 U. S., 490.

Let us briefly review the history of this legislation to ascertain the facts and circumstances surrounding the passage of the act, and the intent of Congress therein.

The Development of the Public Land System.

A review of the history of the public land system will show that the policy of the government with reference to the disposition of the public lands has undergone an entire change during the past one hundred years; yet throughout this period a controlling consideration with every department of government has been the recognition and protection of *bona fide* settlers, who entered upon the public lands for the purpose of securing and establishing a home.

The development of the system for the disposition of public lands may be divided into three eras: the first extending from the beginning of the government to the enactment of the general pre-emption act in 1841; the second, from 1841 to the passage of the homestead act in 1862, and the third, from 1862 down to the present time.

Legislation during these three eras was based upon different principles and policies, and it necessarily follows that in the construction of statutes (passed in these different eras, and under varying conditions, and to give effect to different policies), and in the application of authorities construing these statutes, the historical facts and circumstances must be carefully considered.

1. *The Land System from* 1783 *to* 1841.

In the early history of the country the public lands were regarded as assets of the government, to be sold to the best advantage, the proceeds therefrom to be used in the payment of current expenses, and in the extinguishment of the public debt. During the period from 1783 to 1841 the general policy of the government with respect to the disposition of the public lands was based upon this idea. The general method of disposition during this period was to have certain districts surveyed, and, by proclamation of the President, to give notice of public sale of such surveyed lands, which sale would continue for a limited period of time. At these sales the lands in the surveyed district described in the proclamation were offered at auction and purchased by the highest bidder, no bid of less than one dollar (and in some instances of two dollars) per acre being accepted. After this auction sale had taken place, any lands within the surveyed district not disposed of at such sale were open to private entry for a cash price varying in different cases, but generally $1.25 per acre.

The rapid increase in the population of the country, and the fertility of the lands west of the then settled area, soon led to settlements being made on public lands *ahead of the surveys,* and when the survey was made, and the lands offered at public sale, speculators came in from the settled districts and purchased those lands which had been improved by the earlier settlers. The pioneers, who had expended their resources in opening up wild lands and in building homes, were at the mercy of these speculators, who could easily outbid them at the public sale.

It thus became necessary early in the history of the country, as new districts were opened to sale, to pass special acts for the protection of pioneers, who had settled ahead of the surveys,

and, in the face of hardships and dangers, were extending the borders of civilization, and transforming the waste territory into homes of industry and usefulness. These special acts gave to the settlers upon the public lands ahead of surveys in the districts named in the acts, a preference, or pre-emption right in the purchase of such lands as they had settled upon and cultivated prior to a given date. They were known as pre-emption acts, but they were entirely different in terms and in principle (as we shall attempt to show) from the general pre-emption act of 1841, and legislation subsequent to that date.[1]

The purpose and intent of the special pre-emption acts prior to 1841, and the objects for which they were passed (which should be the controlling consideration in their construction) will be more clearly seen from a brief examination of some of the more important of these acts, and the circumstances surrounding their enactment.

The first pre-emption act was passed in 1801 for the protection and benefit of certain settlers in the Ohio Territory. Prior to this date the government had sold by contract to one Symmes and associates several hundred thousand acres of land in this territory. Before the limits of this grant had been ascertained, settlers under contract with Symmes made settlement upon what they supposed to be a part of the grant, but when its limits were finally ascertained, it was found that many of these settlements were upon the public lands not included in the Symmes grant. To protect these settlers, who had entered upon the land in good faith, Congress passed an act giving them the right of pre-emption in the purchase of the lands upon which they had settled when the same were opened for sale.

Between 1801 and 1841 there were sixteen such pre-emption acts passed, the more important of these being the acts of February 5, 1813 (2 Stats. 979), giving the right of pre-emption in the purchase of certain lands to settlers in the Illinois Territory; the act of April 22, 1826, giving the right of pre-emption to purchase certain lands, to settlers in Florida, Alabama and

[1] For a full discussion of the early land system, the court is referred to *The History of The Public Domain*, compiled by Thomas Donaldson, and published by the Public Land Commission, 1881, Chap. VIII.

Mississippi (under which the complainants claim), and the act of May 29, 1830 (4 Stats. 420), giving the right of pre-emption to settlers upon public lands prior to the passage of that act.

We cannot undertake at this point to examine in detail the provisions of these acts, or the circumstances surrounding the enactment of each. They were similar in their general provisions, though differing in some details, and the purpose in every instance was to confer the preference right in the purchase of land upon *past settlers,* being exceptions from the prevailing general laws for the disposition of public lands.

The general character of these acts may be gathered from the act of April 22, 1826 (4 Stats., 154), under which the complainants claim. This act provides:

> "That every person, or the legal representatives of any person, who, being either the head of a family or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situate in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions, and regulations in every respect, as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen."

The conditions here referred to were that the right should be *forfeited* for failure to give notice of claim to the register and receiver at least two weeks before the beginning of public sales.

By reference to contemporaneous records, it will be found that in every instance the necessity for the enactment of these special statutes arose from the fact that settlers, in obedience to the pioneer spirit of the age, had gone ahead of public surveys, often into territory from which the Indians had not been removed, and, in the face of dangers and hardships, had established homes, and opened the otherwise waste lands to cultivation, with resulting benefits to the country at large; that but for these acts the homes so established would have been at the mercy of speculators when

the lands were opened for public sales. The debates of Congress throughout this era, as well as other public records, bear eloquent testimony to the force with which the rights and equities of these early settlers appealed, not only to the legislature, but to every department of government, and it was for their relief and protection that the various acts from 1801 to 1841 were passed.

As an illustration of these conditions, and of the considerations which appealed to Congress, the court is referred to the debates upon the act of 1826, found in the Congressional debates for that session, page 1422 and the following pages, printed in the Appendix to this brief.

Soon after the Territory of Florida was acquired from Spain in 1819, steps were taken to open the public lands to settlement. As early as 1823 the President had been authorized to establish land offices in the districts of Florida as soon as sufficient lands were surveyed. The making of these surveys, however, was delayed by Indian troubles, and, as in the case of other public lands, settlers had gone ahead of surveys, established their homes, and begun the cultivation of the land, anticipating, no doubt, that the then settled policy of Congress would be upheld, and that an act would be passed, giving them the right of pre-emption in the purchase of the lands so settled before they were offered for public sale. The conditions then existing are fully described in the debates upon the act in the House of Representatives, from which we quote the following statement of Mr. White, of Florida, the patron of the bill:

> "I do not hesitate to believe that the land in the State in which these settlers found it was not worth more than the sum they are required to pay by this law. It is a sound principle in politics and ethics that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labor of these individuals cannot be denied, and what will be their reward if this law does not pass? Their means of purchasing have been exhausted in the improvements of the country and the high prices of provisions; and the inevitable consequence will be that they will be turned from their homes, and forced from their plantations by the rapacity of the heartless speculator with but an inconsiderable augmentation to the treasury. You cannot conceive the distress it will occasion. They have, on account of

> the causes enumerated, but moderate means. They cannot enter the lists of competition with those who are attracted by their improvements the result of toil and labor, with which they have no participation, and for which they feel no sympathy." [1]

In 1830 these settlements upon the public lands ahead of surveys had become so extensive that a general act was passed giving to persons who had settled upon the lands prior to the day named, and were then in possession thereof, the right of pre-emption in the purchase of the same, and this act was afterwards extended by the acts of 1832 and 1834.

This brief review of the conditions existing during this era, and an examination of the provisions of the acts themselves, will show conclusively their purpose and intent, as well as the proper rules for their construction. It is well to notice that these acts did not establish any general pre-emption system. They had no reference to *future* settlements, but were *exceptions* to the general method of disposition by public sale then prevailing, exceptions brought about by the equities of the earlier settlers, and the benefits accruing to the country from their services. They were in the nature of *special grants* to a specific class of persons, like grants to educational institutions, and were for a past consideration, which had been completely executed at the time of the passage of the act. The declared intention and purpose of these acts was the relief and protection to the early settlers, who had made their settlements ahead of surveys, and it need hardly be suggested that it is an elementary canon of construction that this being the intent and purpose of Congress, the courts will so construe these acts as to protect and perfect the rights of any settler who comes within their terms.

Ross v. *Borland*, 1 Peters, 656.

2. *The Era from* 1841 *to* 1862.

For several years prior to 1841 there had been a strong and growing party in Congress demanding that the public lands

[1] See Appendix to this Brief for this debate in full, and valuable discussion of the circumstances leading to the enactment of Act of April 22, 1826. It is cited to show the "surrounding facts and circumstances," and the conditions which Congress sought to remedy. *Smith* v. *Townsend*, 148 U. S. 490.

should be disposed of so as to encourage future settlements, rather than for the best cash price—a sentiment which finally culminated in the homestead act of 1862. As early as 1826 an effort was made under the leadership of Mr. Benton to provide for the disposition of the public lands by entry instead of auction, and by *donation* of unsold lands to actual settlers. (Am St. Papers, Vol. IV., p. 892.) Several efforts had been made between 1830 and 1840 to pass some general pre-emption law making provision for *future* settlements. This movement resulted in the act of September 4, 1841. (5 Stats., 543.) This act provided:

> "That, from and after the passage of this act, every person being the head of a family, or widow, or a single man over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration or intention to become a citizen, as required by the naturalization laws, who, since the first day of June, 1840, has made *or shall hereafter make* a settlement in person on the public lands, to which the Indian title had been at the time of such settlement extinguished, and which has been or shall have been *surveyed prior thereto,* and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the Register of the Land Office for the district in which such land may lie," etc. (Italics ours.)

The act of 1841 was the first pre-emption act providing for *future settlements,* and marked a radical change in the system for the disposition of public lands. (*Moore* v. *Robins,* 96 U. S., 530, 536; Donaldson on Public Domain, 215.) By this act Congress abandoned the system of disposing of lands by public sale, and adopted the system of pre-emption, by which the settler who went upon the land and established his home was permitted to purchase the same at a nominal price.

Before 1841 the system of sales was the general rule, and the pre-emption or relief acts were exceptions for the benefit of a certain meritorious class who made settlements ahead of surveys. Subsequent to that date the pre-emption system was the general rule, and only such lands were sold as were not pre-empted.

Thus, in Donaldson on Public Domain, p. 215, in speaking of the pre-emption system established by the act of 1841, it is said:

"The pre-emption system arose from the necessities of settlers, and through a series of more than fifty-seven years [1783 to 1841], in attempts to sell or otherwise dispose of the public lands. The early idea of sales for revenue was abandoned, and a plan of disposition for homes was substituted. The pre-emption system was the result of law, experience, executive orders, departmental rulings and judicial construction. It has been many-phased, and applied by special acts to special localities with peculiar or additional features, but it has always and to this day contains the germ of actual settlement, upon which thousands of homes have been made, and lands have been made productive, yielding a profit in crops to the farmer and increasing the resources of the nation."

While the pre-emption act of 1841 constituted a radical change in the method of disposing of the public lands, and established a permanent pre-emption system, based upon *future settlements,* subject to certain *conditions precedent,* yet it was but a half-way station, or compromise, between the old system of public sales and the homestead acts which were to follow later.

The act of 1841 was amended and approved by the subsequent acts of 1843, 1853 and 1854, but its general provisions have been retained, and it has remained the basis of the pre-emption system until March 5, 1891, when this law was repealed.

3. *The Third Era, from* 1862 *to the Present Time.*

The demand for a change in the land system, which would give greater advantages to the early settler, and for the abolition of the system of public sales, was not satisfied by the act of 1841. A strong and ever-increasing party insisted that the public lands should be *given* to the actual settlers who occupied, improved and cultivated them for a certain number of years, upon the payment only of the necessary fees to cover surveys and the making of the records. This became a national issue in 1852, and after a fierce political struggle in and out of Congress, culminated in the Homestead act of 1862, the passage of which marks the beginning of the third era in the development of the land system.

Donaldson describes this act as "the third and most important step in the history of the public land system." The examination

of its provisions, however, and of the homestead laws is not pertinent to the inquiries now before the court.

From 1862 down to the present time the general disposition of the public lands of the agricultural class has been under the pre-emption system as established by the act of 1841, and the homestead system established by the act of 1862, with such amendments as might be necessary to perfect these systems under the varying conditions.

In addition to the general system for the distribution of the public lands under the acts to which we have referred, there have been special acts from time to time, such as educational grants, swamp-land grants, donation acts, etc., making grants or conferring privileges for the promotion of education, to encourage the settlement and improvement of the public lands, and similar purposes conceived to be for the public good. There is a striking analogy between these special acts, constituting, as they do, exceptions from the prevailing system and making grants *in presenti* of the public lands for quasi public purposes, and the early pre-emption acts, such as that under which the complainants claim; which analogy will be brought more to the attention of the court hereafter. Indeed, the early pre-emption acts being exceptions from the then existing system, were, in fact, special grants, for a past and executed consideration, to a defined class of persons.

This brief sketch of the public land system is sufficient to show:

(1) That from the earliest times the relief and protection of the first settlers has been a controlling consideration with every department of the government; that first the protection and afterwards the encouragement of *bona fide* settlements for the purpose of making a home has been regarded as a most important consideration in the disposition of the public lands—a consideration which finally led to the practical abandonment of the system of sales and the enactment of the pre-emption and homestead laws.

(2) That the pre-emption acts prior to 1841 were entirely different in terms and in theory from the act of 1841 and subsequent pre-emption acts, and are subject to different rules of construction.

Since the failure of the Interior Department to distinguish between these different classes of pre-emption acts and the rights given thereunder, as well as the failure to distinguish the authorities and rules of construction applicable thereto; and the failure to consider the historical facts surrounding the act under construction, constitute the radical and fatal errors in the decision of that department upon the Fort Brooke cases, we deem it important to get these distinctions clearly before the court as a basis for the rules of construction by which we will attempt to ascertain the rights of the Hackley heirs under the act of 1826.

The more important distinctions between these two classes of pre-emption acts may be summarized as follows:

(*a*) The special pre-emption acts prior to 1841 gave the right of pre-emption *only* to persons who had settled upon, inhabited and cultivated the public lands within the district covered by the act, *before the date of its passage, or before some antecedent date named in the act; e. g.,* the act of 1826 only gave the right of pre-emption to such persons as had settled upon the land in the district described prior to January 1, 1825.

The act of 1841 gave the right of pre-emption to any person coming within its terms who should make *future settlement upon the public lands* and comply with certain *conditions precedent,* named in the act.

(*b*) The special pre-emption acts prior to 1841 gave the right of pre-emption in consideration of *past* settlement and cultivation, thus being in effect *grants in presenti* of an immediate, equitable *interest in or title to* the land to which the early settler might be entitled under their terms, in consideration for the *benefits which the public derived* from the services of the pioneers for whose protection the acts were passed; subject only to *forfeiture* for failure to perform certain *conditions subsequent.*

The act of 1841 and subsequent pre-emption acts gave the right of pre-emption to *future settlers* upon the performance of certain *conditions precedent.*

It is a well-settled principle of law that a court of equity will not enforce a forfeiture on account of failure to perform conditions subsequent, except in the clearest cases, and such forfeiture can only be enforced by the grantor who imposed the condition.

It is equally well settled that where the vesting of a right or interest is dependent upon the performance of conditions precedent, the person claiming that right or interest must perform those conditions strictly and literally, before any right whatever is acquired.

Holden v. *Joy,* 17 Wall., 211.
Schoonburg v. *Harrison,* 16 Wall., 44.
Davis v. *Gray,* 16 Wall., 203.

In the light of these principles the immense importance of the distinctions between the early pre-emption acts and the act of 1841, and subsequent acts, will be appreciated. Indeed, without carefully distinguishing the terms, as well as the theory and intent of these acts, and the historical circumstances surrounding the enactment, the authorities construing the various pre-emption acts cannot be intelligently considered.

Thus, in the opinion of the Secretary of the Interior, dated November 25, 1892, the case of *Frisbee* v. *Whitney,* 9 Wall., 187, is cited with approval as a controlling authority in defining the nature and character of a pre-emption right, in the following language:

> "In the case of *Frisbee* v. *Whitney* (9 Wall., 187), the Supreme Court held that occupation and improvement of the public lands, with a view to pre-emption, conferred no vested right in the lands so occupied; that such vested right is only obtained under the pre-emption laws where the purchase-money has been paid and the receipt of the proper land officer given to the purchaser," etc.

It may be noted, however, that in *Lytle* v. *Arkansas,* 9 How., 314, 334, the Supreme Court of the United States, in construing the pre-emption act of 1830, and in speaking of the nature of a pre-emption right acquired thereunder, said:

> "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right; but when covered by law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it."

These expressions of the Supreme Court are conflicting upon their face, as one says that no right is acquired until the money

is paid and all conditions performed, while the other says that when covered by law (that is, when the act is passed giving the former settler the pre-emption right) it is a legal right subject only to forfeiture by failure to perform conditions subsequent. When, however, these expressions are considered with reference to the act which the court is construing in each case, and the historical facts and circumstances, there is no conflict, because under the act of 1841, and subsequent acts, which the court was considering in the case of *Frisbee* v. *Whitney*, the pre-emption right was contingent upon the performance of *conditions precedent*, all of which must be fully performed before *any right whatever* is vested; while the court in *Lytle* v. *Arkansas* was considering one of the earlier pre-emption acts passed, as we have seen, for the protection of former settlers, giving the right of pre-emption for a past and executed consideration, and, therefore, it gave an *immediate vested right*, subject only to *forfeiture*, as stated by the court.

This is but one of the many radical errors in the application of authorities by the Interior Department, but it is sufficient to show the superficial character of the investigation upon which those decisions were based. It also shows the necessity for understanding clearly the distinction between the nature and character of these two classes of pre-emption acts, and the historical facts and circumstances surrounding them, before we undertake to consider the acts themselves.

(*c*) Most of the pre-emption acts passed *prior* to 1841 gave the right of pre-emption to settlers upon the *unsurveyed public lands*. And the first section of the act of February 5, 1813, which was incorporated into the act of April 22, 1826, expressly recognizes unsurveyed lands as subject to the pre-emption claims of the persons affected by these acts. An examination of the historical facts shows that the right there given applied especially to purchasers who had settled upon public lands *ahead of surveys*.

The act of 1841 confined the pre-emption right given to *future settlers* to lands which had been *surveyed at the time the settlement was made*. This distinction is clearly upon the face of the acts themselves, but a failure to notice it led the Interior Department into serious error, and is a basis for one of the grounds of demurrer in this case.

From this brief review of the historical development of the land system, of the facts and circumstances surrounding the enactment of the various pre-emption acts, and of the important distinctions between the early and the later pre-emption acts, we deduce the following rules of construction governing the consideration of the claims of the Hackley heirs under the pre-emption act of 1826:

(1) The court must strive to ascertain the intent and purpose of Congress, and to so construe the various acts bearing upon the Hackley claim as to give effect to that intent.

(2) In striving to ascertain the legislative intent, the court will look to preceding history upon the subject, and to the facts and circumstances surrounding the enactment of the statute under consideration.

(3) The early pre-emption acts prior to 1841, being remedial in their character, and having been passed for the purpose of protecting a meritorious class of settlers, a court of equity will construe those acts liberally in favor of said settlers to accomplish the purpose which Congress had in view.

(4) The act of 1826 having given a present interest in or right to land for a *past* and *executed consideration*, subject only to *forfeiture* for failure to perform *conditions subsequent*, such forfeiture will not be enforced except upon demand of the grantor, and where there is a clear case of violation of the conditions subsequent named in the act or grant.

(5) The act of 1841 and subsequent pre-emption acts being entirely different in theory and in terms from the earlier acts, and the rights given thereby being rights *in futuro*, subject to certain *condition precedent* (entirely different in character from the rights given under the earlier acts), the authorities construing the act of 1841 and subsequent acts cannot be considered as governing or affecting the construction of the act of 1826 and the earlier pre-emption acts; but these early acts must be construed in accordance with their terms and intent, and upon decisions construing similar acts.

(6) That in the construction of the statutes bearing upon the complainants' claims, the court will look to contemporaneous construction of such acts by the executive departments of the

government having in charge the execution of the same, and will be governed by the construction given by such executive department, unless the same be clearly erroneous.

United States v. *Philbrick,* 120 U. S., 52.
United States v. *Johnson,* 124 U. S., 236.
Robinson v. *Bradbury,* 132 U. S., 491.

With the historical facts and circumstances and rules of construction before us, let us next consider the claim of the Hackley heirs under the act of April 22, 1826.

II. The Claim of Robert J. Hackley and His Legal Representatives under the Act of April 22, 1826.

Before taking up in detail the specifications of demurrer, it is well to have clearly before the court the provisions of the act of April 22, 1826 (4 Stats., 154), and the claim of the complainants thereunder.

We will inquire (1) whether, upon the facts of this case found by the Interior Department, and admitted by the demurrer, Robert J. Hackley, and his legal representatives come within the terms of the act of April 22, 1826, and (2) if so, what was the nature and extent of the right or interest given by that act.

1. Do Robert J. Hackley and His Legal Representatives Come Within the Terms of the Act of April 22, 1826?

This act, so far as applicable, reads as follows:

> "That every person, or the legal representative of any person, who, being either the head of a family or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by an act, entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen; *Provided,* That no person shall be entitled to the provisions of this section who claims any tract of land in said Territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

The "terms," etc., of the act of February 5, 1813, referred to above, are as follows:

> "That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale

of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land in every respect, as are or may be provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase; *Provided,* That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run, or to be run,* under the direction of the Surveyor-General for the division of the public lands. *Provided also,* That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act."

"That every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person, so entitled, shall have a right to enter the same, with the Register of the Land Office, on producing his receipt from the Receiver of Public Moneys, for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale; *Provided,* That all lands to be sold under this act shall be entered with the Register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the Register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

The provisions of the act of 1813, in relation to forfeiture, will be considered hereafter.

The bill alleges (Record, p. 5), and it is admitted, that Hackley never claimed any land in the Territory of Florida by virtue of a confirmation of commissioners, or by virtue of any act of Congress, so this provision of the act of 1826 has no bearing upon this case.

An analysis of the above statutes will show that a person, in order to be entitled to the right of pre-emption thereunder, must fulfill the following requirements:

(1) He must be a *person,* or the *legal representative* of a person, who was either the *head of a family,* or *twenty-one years of age* on or before the *1st of January,* 1825.

(2) He must have *actually inhabited and cultivated* a tract of land situated in the Territory of Florida, on or before the *first day of January,* 1825.

(3) Such tract of land must not have been *rightfully claimed* by any other *person* on the *22nd day of April,* 1826.

(4) He must not have *removed from the Territory* of Florida on or before the 22nd of April, 1826.

Any and every person who could, at the date of the passage of the act, fulfill the four above-named requirements, was given the *absolute right of pre-emption* to lands surveyed or unsurveyed, the tracts to be bounded by the lines of the surveys "run, or to be run," as of the date of the act, to-wit, April 22, 1826. Let us test the Hackley claim by these conditions.

1. The claimant must be a *person,* or the *legal representative* of a person, who was either the head of a family or twenty-one years of age on or before the 1st of January, 1825.

It is alleged in the bill (R., p. 5) that at the date of his settlement in 1823, Robert J. Hackley was *twenty-one years of age,* and then the *head of a family,* and this is found as a fact by the different officers of the Interior Department in their several opinions filed as exhibits with the bill. It is thus seen that Robert J. Hackley came within the terms of the act of 1826, as to age, and being the head of a family, and that the complainants in this case come within the express language of the act, being the *legal representatives* of such person.

2. He must have *actually inhabited and cultivated* a tract of land situated in the Territory of Florida, on or before the *first day of January,* 1825.

Upon this point the bill (at page 5) contains the following allegation, which is admitted on demurrer:

> "Your complainants further show that about the month of November, 1823, the said Robert J. Hackley, who was then over twenty-one years of age and the head of a family, settled, inhabited and cultivated a certain tract of land situated on the east side of Hillsborough river, at its confluence with the eastern arm of Tampa bay, sometimes known as Hillsborough bay, in what was then the Territory now the State of Florida."

The several officers of the Interior Department, including both Secretaries, who passed upon this case, found as a fact that Hackley did settle upon, inhabit and cultivate the tract of land described in the bill in the year 1823–'24; that he made such settlement in good faith for the purpose of securing a home, and that at the time such settlement was made the land was far removed from civilization, and was a trackless forest.

It will thus be seen that Hackley comes within the express terms of the second requirement of the act of 1826.

3. Such tract of land must not have been *rightfully claimed* by any other *person* on the 22nd day of April, 1826.

The bill alleges in terms that "said tract of land was not rightfully claimed by any other person on or before the 22nd day of April, 1826" (page 5). It is contended that temporary occupancy by the troops of the United States in camp was a rightful "claim" by some "other person." This contention will be fully considered hereafter. The record shows clearly that, as a matter of fact, no "person" except Hackley ever pretended to make "claim" to this land until after it was restored to the public domain in 1883, and the "claims" of the defendant Carew were initiated.

4. He must not have removed from the Territory of Florida on or before the 22nd of April, 1826.

The bill alleges as a positive fact (R., p. 5), and it is admitted, not only that Hackley had not removed from the Territory of Florida at the time of the passage of this act, but that he continued to reside in that Territory and State until his death, in 1845, at Tallahassee; and this is found to be a fact by all the officers of the Interior Department in their several opinions in this case. It is thus seen that Hackley comes within the express terms of this, the fourth and last requirement of the act.

It is respectfully submitted, therefore, that the claim of Hackley could not have been more accurately covered if Congress had had his specific claim in mind at the time of the passage of this act. It is a recognized principle that where a statute "is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices, then interpretation is needless." The act being plain in its terms, the court must give it effect.

Sutherland on Construction of Statutes, Sec. 234.
United States v. *Hartwell,* 6 Wall., 395.
United States v. *Wiltberger,* 5 Wheat, 95.

Not only does the claim of Robert J. Hackley and his legal representatives come within the letter and terms of the statute of April 22, 1826, which fact is conclusive upon the court, but the equity of the claim is strengthened by a consideration of the facts upon which it is based, and the historical circumstances surrounding the enactment of that statute which show that this claim is fully within the purpose and intent, as well as the terms thereof.

We have already seen, in our review of the circumstances which led to the enactment of these early pre-emption acts, that they were relief acts for the protection of settlers who, in obedience to the pioneer spirit of that age, went upon the public lands, and made settlements ahead of surveys, often when the land settled upon was a trackless forest, and that such acts were necessary to protect settlers from the avarice of speculators, who afterwards came in to purchase the land when the same was open for sale.

It will appear from the record, and is an historical fact, of which the court will take notice, that the Indians were removed

from the section of Florida in which the land in question is located in 1824. (See Debates on Act of 1826, in Appendix.) The record shows that Hackley, who was a Virginian, went from New York to Southern Florida, selected the land in question as a place upon which to build his home, erected a house, and began the cultivation of the land. The conditions then existing may be best described in the language of the Register and Receiver and the Commissioner of the General Land Office, found in the opinion of the latter, filed as an exhibit with the complainants' bill. These officers says (R., p. 27):

> "The letters on file in support of Mr. Hackley's claim show that Hackley moved to the Territory of Florida in 1824, when it was a dense wilderness, his only companions being Indians, alligators, panthers and wolves, and that he dwelt upon the reservation for some time prior to the arrival of Colonel Brooke. This seems to us to entitle his claim, or that of his heirs, who shared with him the privations of frontier life, to serious consideration, and believing that Hackley made entry in good faith, and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, we consider his claim superior, in the absence of adverse claims, to the claims made after the abandonment of the fort in 1883.

Again, in this opinion, it is said:

> "Hackley's settlement antedates all other claims, antedates the selection of the site for a cantonment, antedates the reservation. He appears, in fact, to be the first white man who ever lived on this land. He unquestionably is fully protected by the act of 1826, that of 1858, and that of July 5, 1884. He meets the requirements of the first provision of the second section of the latter act."

These findings of facts as to Hackley's settlement, and the conditions surrounding it, are repeated almost in terms by the Secretaries of the Interior in their respective opinions in this case.

It was to protect just such settlers, and to cover just such claims, that the act of 1826 and other pre-emption acts prior to 1841 were passed by Congress. Indeed, the protection of these early settlers, and the encouragement of such settlements, has had the careful attention of every department of the government from

the earliest periods in its history. Their rights and equities have appealed to the government, and have always met with recognition.

Lamb v. *Davenport,* 18 Wall., 307.

In speaking of these very settlers in the Territory of Florida, in the debates upon the act of 1826 (which are cited to show the existing facts and circumstances, and the ideas pervading Congress at the time), Mr. White, the patron of the bill, said:

> "The policy of all the governments on this side of the Atlantic has been to extend their settlements as widely as possible; to attach the inhabitants to the country, and their government, by giving them an actual share in the real property, that they might not in times of difficulty return the answer of the Roman people on Mount Aventine to the ambassadors of the Senate. Pioneers and adventurers of new colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many important benefits to the country, in increasing its facilities, extending its empire and protecting its borders, have always been, and ought to be, rewarded."

Again the same speaker said:

> "It is a sound principle in politics and ethics that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labors of these individuals, cannot be denied."

Mr. Owen, another member of the House of Representatives, in speaking upon the same bill, is reported as follows:

> "He thought it was our true policy to grant to those who settled upon the lands the right of pre-emption; it was their labor which gave value to the lands; without it they would have had none. He considered it wise to encourage those who might with propriety be termed the pioneers of a more dense population. It was they who, by braving the dangers and overcoming the difficulties of an unsettled country, opened the way for the introduction of capital and all improvements of civilized existence."

It was upon arguments such as these (which will be found printed in full in the Appendix), and in the light of these "sur-

rounding facts and circumstances that Congress passed the act of 1826. They could not have more accurately described the Hackley claim if they had named it in the act.

Turning to the Executive Department of the government, we find it, too, has always recognized the equities of these earlier settlers, and has always sought to protect their rights. Evidence of this fact will be found in executive documents throughout the early history of the government, dealing with these pre-emption acts, some of which have already been quoted. The following sentence, quoted from the message of President Buchanan, in 1860, is but an illustration of many expressions to be found in contemporaneous records upon the subject:

> "The first settlers of a new country are the most meritorious class. They brave the dangers of savage warfare, suffer the privations of frontier life, and with the hand of toil bring the wilderness into cultivation. The 'old settlers,' as they are everywhere called, are public benefactors." (Donaldson, Pub. Dom., 343.)

The Judicial Department of government has not been less jealous in the protection of the rights of these early settlers, and in the recognition of their claims. An illustration of this is found in the case of *Lytle* v. *Arkansas,* 9 How., 334, in which the Supreme Court of the United States, in speaking of a pre-emption claim under the act of 1830 (which was similar in its general terms to the act of 1826), there sought to be overturned by the State of Arkansas, said:

> "The claim of a pre-emption is not that shadowy right which, by some, it is considered to be. Until sanctioned by law, it has no existence as a substantive right, but when covered by the law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of citizens. The adventurous pioneer who is found in advance of our settlements, encounters many hardships, and not infrequently dangers, from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing a favored spot selected by him, not exceeding

one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years."

See also *Wynn* v. *Morris*, 16 Ark., 414.
Lamb v. *Davenport*, 18 Wall., 307.

Many other expressions of the different departments of government with reference to these early pre-emption claims, might be cited to the same effect. Those quoted, however, are sufficient to establish our contention that the claim of Hackley and his legal representatives comes not only within the letter and the terms of the act of 1826, but comes fully within the spirit, the purpose, and the intent of that act; and that to fail to recognize that claim would defeat a most beneficent policy which was established by Congress, with reference to these early settlers, and violate some of the most elementary rules of statutory construction.

Let us next inquire what was the nature and extent of the interest given by the act of 1826.

II. The Nature and Extent of the Interest Granted by the Act of April 22, 1826.

In considering the nature and extent of the interest granted by Congress to settlers upon the public lands in the Territory of Florida, prior to the 1st of January, 1825, by the act of April 22, 1826, it is not improper, perhaps, to allude again to the fact that the complainants are not attempting to establish a claim against the United States Government—a suggestion which is made necessary by the fact that counsel for the demurrants have cited in this connection numerous cases to which the government was a party, as authorities controlling this case. Were it necessary, we feel confident that we could establish a claim to this land on behalf of the complainants which even the government itself, under well-settled principles, would be compelled to recognize; but no such necessity exists. The government has no interest whatever in this controversy, and the authorities deciding contest between claimants to public lands and the United States have no bearing upon this case. Different rules of construction are applicable; for grants, like charters, are construed strictly in

favor of the government, while in a contest between individuals claiming the public lands, it has been the universal policy of every department of government to construe legislation favorably to the first settler. It is well settled, also, that the courts will often recognize and protect the claims of an early settler against the claims of a subsequent settler, even though such claims would not be recognized as valid against the United States. This distinction is clearly drawn in the case of *Frisbee* v. *Whitney*, 9 Wall., 187, and authorities there referred to.

It is submitted, also, that the rights of Robert J. Hackley and his legal representatives must be tested by the facts and the law as they existed *at the time the Hackley claim was initiated.* If that right then vested we feel that it can be shown beyond controversy that it still exists.

Our contention is that the act of April 22, 1826, gave to Robert J. Hackley, by virtue of his settlement upon and cultivation of the tract of land in question, a *vested right to, or interest in, said land,* which right or interest vested in said Hackley for the benefit of himself and his legal representatives *immediately upon the passage of the act relating back to the date of settlement;* and that said right or interest (then good against the world) could only be divested by failure of said Hackley or his legal representatives to comply with a *condition subsequent* contained in the act of 1813, to which reference was made in the act of 1826, followed by some *act* on the part of the grantor (the United States) *enforcing the forfeiture;* that said conditions subsequent were fully performed, and the United States has never sought to enforce a forfeiture; that, therefore, the heirs of the said Robert J. Hackley are entitled to patents for said land, and the same should have been issued to them by the Interior Department.

We will consider the question of forfeiture hereafter. The vested character of the right acquired will appear from the terms of the act, and the facts of this case, under the authorities applicable thereto.

In support of our contention that the act of 1826 was a grant in *presenti* of an equitable right or interest in the land, we call attention first to the fact that the terms of the act are in the present tense. In the title it is called "An act *giving* the right

of pre-emption," &c.; the term "giving" in this connection being, under well-settled rules of construction, equivalent to "granting."

In the body of the act it is declared that the persons described "shall be entitled to the right of pre-emption in the purchase thereof," &c., which is equivalent to saying that they shall now, as of the date of the passage of the act, be entitled to this right, or vested with the interest resulting therefrom.

It will be further noticed that the act did not require that any condition be performed *before* the right given should vest. It gives an *immediate* right, subject only to forfeiture for failure to give notice of the claim at least two weeks before the public sale, which sale, it may be here remarked, *has never taken place.*

The vested character of this right or interest will more clearly appear, however, when we consider the nature of the transaction, and the consideration for which this right was granted.

The pre-emption act of 1826 was not a bounty; it was but an act of justice. By reference to contemporaneous records, it will be seen that Congress and the executive departments of the government regarded these pre-emption rights as a payment to the early settlers for the labor and service which they had performed in opening up the public lands and increasing the value of the territory contiguous to the lands upon which they had settled.

Thus in the debates upon the act of 1826 (see Appendix), Mr. White, of Florida, the patron of the bill, in speaking of the principle upon which the pre-emption right was granted, said:

> "Pioneers and adventurers of our new colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many *immediate benefits* to the country, in increasing its facilities, extending its empire, and protecting its borders, have *always been, and ought to be, rewarded.*" (Italics ours.)

Again, the same speaker says:

> "If any gentleman supposes that upon an enlarged view of this subject, the United States will lose by the passage of this law, he will be greatly mistaken, unless they avail themselves of the labor of those adventurous citizens without a *fair equivalent.* The *value* above the government price is

derived from *their labor*, and the *means they have furnished* in penetrating the country. See the returns of the sale in Tallahassee; refer to the price of lands in the States; when it sells for *twelve dollars* per acre, *ten* of that is derived from the *improvement*, because land in its vacant state requires that sum to improve it. I do not hesitate to believe that the land in the state in which these settlers found it was not worth more than the sum they were required to pay by this law. It is a sound principle in politics and ethics that he who *benefits the public is entitled to his reward.*" (Italics ours.)

Again, after reviewing the difficulties and dangers overcome by these early settlers, he says:

> "Is it just, sir, that one who has, by improving the country, *increased the value of all the contiguous land, and whose labor alone has given additional value to the spot on which he has located his family*, shall be expelled *without an equivalent* from his home, by affording to the ruthless speculator an opportunity to buy it over him?"

In the same debate Mr. Owen, another member of the House, is reported as follows:

> "He thought it was our true policy to grant to those who settled upon the lands the right of pre-emption. *It was their labor which gave value to the lands; without it they would have had none.* He considered it wise to encourage those who might with propriety be termed the 'pioneers of a more dense population.'" (Italics ours.)

Again, in speaking on the same bill, Mr. White, of Florida, said:

> "If, then, sir, the lands on which these settlers live are worth more at this time, from what is it derived? *Their own labor.* And is it just that the government should appropriate the labors of its own citizens to fill its coffers? Sir, it would be making slaves of the most deserving of our population. If the land is worth a dollar and a quarter or two dollars in the woods, and it costs *ten dollars to clear it*, is it fair or magnanimous to take from the settler, encouraged to locate there by your laws, more than the value of the land in its unimproved condition?" (Italics ours.)

This entire debate is printed in the appendix to this brief, and to this the court is referred for a full statement of the facts and

circumstances existing at the time which moved Congress to enact this legislation. The terms of the act itself, taken in connection with these facts and circumstances, are sufficient to show that Congress, in granting this land to the actual settlers prior to the 1st of January, 1825, for only a nominal consideration of a dollar and a quarter per acre, accepted the labor of the settlers in clearing and improving the land, and the resulting benefits to the public at large, and the increase in the value of the other lands of the government, as *a payment by the settler for the lands so granted.*

Now, it is respectfully submitted, that if a citizen of the United States had at that time made an offer to the government to open up a portion of certain tracts of lands which were of little value in woods, but which when opened would have been worth ten dollars an acre, upon consideration that when same was opened for cultivation he should purchase it for $1.25 per acre, and Congress had accepted the offer regarding the labor of opening the public land, and the benefit to the surrounding land, as a payment of the balance of the market price of the land when improved, no one could have questioned but that this transaction would have given to such purchaser a valid, vested, equitable interest in the land, which could not have been defeated by subsequent acts of the government, or by any subsequent settler upon the land. This is just what the transactions involved in this pre-emption act amounted to. The government accepted the labor and services of the early settler as a part payment for the land, and when the act of 1826 was passed, granting to such settler the right of pre-emption in said land so settled upon and cultivated, at a mere nominal price of one dollar and a quarter per acre, regardless of its then actual value, it gave a vested right or interest in that land to the settler who came within the terms of the act, in consideration of labor and services performed, which could only be defeated or divested by the failure to perform certain *conditions subsequent named in the act,* followed by an *act enforcing the forfeiture* on the part of the grantor—a forfeiture which under the conditions of the case a court of equity would be *most reluctant* to enforce.

The vested character of this pre-emption right was clearly recog-

nized by the contemporaneous authorities construing these acts, and the whole trouble in this case grows out of the fact that the Interior Department, and counsel for the demurrants, are attempting to construe this early pre-emption act, and the rights acquired thereunder, by authorities dealing with *subsequent acts* based upon *entirely different principles,* where the *vesting* of the right was dependent upon the performance of certain *conditions precedent.*

Thus in a communication from the Secretary of the Treasury to the Commissioner of the Land Office, March 13, 1819 (2 P., L. L. I. and O., p. 298), in speaking of the pre-emption rights in Missouri under the acts of 1813 and 1814 (which were similar in terms to the act of 1826), he says:

> "In no case shall the location of New Madrid certificates upon any tract of land to which the right of pre-emption *has been* or *shall be* established, be considered lawful or recognized by the receivers and registers of the then land offices in the Territory of Missouri. . . .
>
> "In every case where any quarter section or fractional section to which the right of pre-emption existed has been sold at public or private sale in consequence of *instructions from the General Land Office, such sale to be considered as null, and the money to be refunded to the purchaser.*" (Italics ours.)

In other words, the Secretary declares that where the right of pre-emption has been given to any tract of land a subsequent sale by the government, and the payment of the money by the purchaser, cannot affect that right, although proof and payment has not been made by the pre-emptor claimant, and that the sale will be considered as null, and the government will return the money upon proof of a pre-emption claim, althought the sale was made under "instructions from the General Land Office." Could there be a stronger recognition of a vested right on the part of the pre-emption claimant?

On August 23, 1830, Attorney-General Berrien gave to the Secretary of the Treasury an opinion defining the pre-emption right as given by the act of 1830, which act was similar in many of its provisions to the act of 1826, though not so broad in its scope, in that it excepted all lands reserved by Congress or the

President, for any use whatever. The *nature* of the right given, however, was the same, relating, as it did, to past settlements. The inquiry which the Attorney-General was called upon to answer was, "Does the act confer upon the pre-emptioner such an *unqualified right* to the land occupied as to preclude the entry and purchase of it by any other person while the act continues in force?" In this opinion (2 P., L. L. I. and O., 61) the Attorney-General says:

> "Here is an *unqualified right of entry* to all persons who had the possession, and who had made the cultivation required by the act, which right of entry, so far as this section provides, is unlimited as to time," &c.

The Attorney-General then reviews the exceptions named in the act (which were not in the act of 1826), and continuing, says:

> "Subject to these exceptions, it is an *unqualified right*, and in its exercise is not restricted as to time, except in the case of lands offered for sale under the proclamation of the President, in regard to which it is limited by the time appointed for the commencement of the sales and in relation to all others by the duration of the act."

The Attorney-General, after a full discussion of the act, then answers the above inquiry in the affirmative, saying, "I incline to think the right of the occupant, if exercised by making proof and payment required at any time *during the continuance of the act, will prevail,*" etc.

In a communication from the Commissioner of the General Land Office to the register and receiver at Mount Salus, Miss., dated February 17, 1831, in discussing the right given by the act of 1830, just mentioned, that officer says:

> "The question, therefore, arose how to admit the private entries of lands which had been offered at public sale prior to the date of the act of May 29, 1830, to proceed as usual, without running the hazard of interfering with persons who, under the strict letter of the law, might have a *vested right to a pre-emption,* but whom we could not compel to come forward with the proof of such claim, within the year." (Italics ours.)

In the same communication that officer said:

> "I would observe that many cases exist where lands have been *sold at private sale,* to which the right of pre-emption has *since been approved and will be sustained under the law.*" (Italics ours.)

It will thus be seen that the vested character of the pre-emption right granted by these early acts was clearly recognized and acted upon by the different officers of the Land Department, in their contemporaneous construction of these acts, and that the Interior Department, in passing upon the Hackley claim, simply did not take the trouble to examine its own decisions on these acts.

This construction of the pre-emption act of April 22, 1826, is not confined to the Executive Department, for we find it affirmed by the highest courts, both State and Federal.

An early and well-considered case upon this subject is that of *Wynn* v. *Morris,* 16 Ark., 414, which was a pre-emption claim by Keziah Taylor to a tract of land in Arkansas under the act of 1830. (4 Stats., 420.)

This act was similar in terms to the act of 1826, except that it was narrower in its scope, in that it required the claimant to be *in possession* on the day of the passage of the act, and excepted from its operation lands *reserved for any purpose,* provisions *not contained* in the act of 1826.

The *nature* of the right granted, however, by the act of 1830 was identical with that of 1826, both being applicable to *past* settlers; therefore, the authorities upon the former, construing like provisions, are equally applicable to the latter.

In *Wynn* v. *Morris, supra,* the lands were not surveyed until *December, 1841,* within one year after survey allowed by the act of 1830, as extended by the act of 1834, viz., on the 9th of December, 1842, Mrs. Taylor appeared in person before the Register and Receiver of the Land Office at Washington, Arkansas, and upon the usual showing of cultivation in 1829, and possession on May 29, 1830, was allowed to enter and pay for land at the minimum price, and obtained the usual receiver's receipt therefor, upon which a patent issued in her name on the 23rd of February, 1844, all of which was allowed to be done, notwithstanding the

fact that prior thereto, viz., on *May 16, 1841*, the tract in controversy had been selected by the duly authorized locating agent for the State of Arkansas as a part of the 500,000 acres granted by Congress for internal improvements by the act approved 4th September, 1841.

After much litigation, a patent was issued to Mrs. Taylor, and Wynn brought suit in State courts of Arkansas against one Morris, the assignee of Mrs. Taylor (see *Wynn* v. *Morris*, 16 Ark., 414), and had as his attorney Gen. Albert Pike, one of the greatest and most celebrated lawyers of his day.

The Supreme Court of Arkansas on appeal found the following facts:

> "In reference to occupancy and possession of the tract of land in controversy, the facts appear to be that about the year 1821 William Hemphill settled on the southwest quarter of section seven, and soon after extended his improvement on to the land in controversy. That in 1824 or 1825 he departed this life, leaving a widow and two children (one of whom died) in the possession of his improvement. His widow, Keziah, now Keziah Taylor, remained there, and, in 1826 or 1827, married Thomas Jacobs, who lived there until his death, in 1828, after which his widow, Keziah, remained there until after the 29th of May, 1830, perhaps until the fall of that year, or until the spring of 1831. Her cultivation of the tract of land in question in 1829—either by herself, or some one for her—and her possession of it on the 29th of May, 1830, may be regarded as fully enough established, her residence all the time being upon section seven.
>
> "In the fall of 1830, or spring of 1831, she clandestinely left the United States, expressing her intention never to return again, and settled in Texas, where she soon after married a man named Taylor.
>
> "It thus appears that from the time of Mrs. Taylor's removal from the United States until her appearance at the Land Office to make her pre-emption claim was a period of twelve years. And there is no evidence that any claim to the land in controversy had been made in her behalf for nearly eleven years. During all this time she had been permanently residing in Texas, having become a *feme covert* there during the first year of her residence." She sold her improvements on the land to one Bales before leaving for Texas.

Upon this state of facts the court delivered its opinion, from which we extract the following:

"It is not at all probable, in point of fact, that Mrs. Taylor intended to sell a pre-emption right to the land in controversy, or that Bales intended or expected to buy such a right. The lands had not then been surveyed by the government, and whether or not they ever would be, was dependent upon the doubtful matter, whether they would be found within the territorial limits of the United States upon the running of the boundary line between this country and Texas, which was not done until some ten years afterwards. Nor had she done any act—nor was it in her power to do any such by reason of the want of the public surveys as a means of identifying her land—indicating an election on her part to accept the gratuity offered her by the government, and thereby change the character of her occupancy from that of a mere squatter to that of lawful possession under color of a *vested legal right.*

"Nor was the sale of her occupancy and improvement, at the time she made it, a sale either of the thing out of which her pre-emption right grew, or in which it lived. That right did not grow out of, or live in, any occupancy of or improvement upon the public lands which existed after the 30th of May, 1830. Occupancy of and improvements upon the public land, either prior to the time when the law of 1830 would operate upon them, or subsequent to the 30th of May, 1830, were equally incapable of springing up, or sustaining a pre-emption right under the law of that year. That right grew out of facts that were as incapable of being transferred to and fixed in a purchaser by sale as yesterday or last week would be. *These facts were a cultivation and possession that were past and gone, not a cultivation and possession now existing.*

* * * * * * *

"But supposing Wynn to be in a condition to contest the validity of Mrs. Taylor's pre-emption right, and the grant thereon, it would seem to be well enough sustained.

"She could not have known with certainty of its existence until the boundary line was run between the United States and Texas, which was not a great while before she appeared at the Land Office to prove it up, although she had been absent so long before.

"Her cultivation in 1829, and possession the 29th June, 1830, seems well enough established; indeed, they were

admitted by Wynn in his correspondence with the Commissioner of the General Land Office, and seem now to be admitted by his counsel. *And her pre-emption right being thus 'covered by the law,' it became a legal right, subject to be defeated only by the failure to perform the conditions annexed to it.* And those which were subsequent were but proof to the satisfaction of the Register and Receiver of the proper land office and payment within the time prescribed by act of Congress. And this having been rendered impossible by reason of the surveys not having been made and the plats returned on the part of the government within that time, the act of Congress of the 14th July, 1832, afforded her relief, and enabled her to reap the benefits of that of 1830, under which her rights had vested, to which the act of 1832 was a supplement. *Lytle* v. *The State of Arkansas,* 7 Eng. Rep., at p. 34; *Gaines and others* v. *Hale* (ante).

"The further supposed condition of continued actual occupancy and possession under the act of 1830 has never been required by the Commissioner of the General Land Office, whose judgment, in the administration of the land laws, is enlightened by the law officers of the government. And in the case of *Lytle* v. *The State* (9 How., U. S. Rep., 314), already cited, which stood on demurrer, the bill contained no such allegation. Whatever evils or hardships may have occasionally resulted to a second settler upon an apparently abandoned occupancy, or to the purchaser of an improvement upon lands to which a pre-emption right had vested, who might occupy and continue to improve the land in the interval between the accrual of the right and its consummation—often protracted to a great length by the tardiness of the public surveys—the courts are not authorized to remedy them by imposing upon the pre-emptor conditions beyond those imposed by the act of Congress under which *his pre-emption right has vested.* Nor are such second settlers or occupiers of improvements—who are no other than trespassers—within the saving influence of equitable doctrines, applicable to those who predicate their rights of occupancy upon law. Some of the evils of the earlier pre-emption laws have been remedied by provisions in later ones, experience having shown such evils, and the wisdom of Congress provided against them for the future; but this can lay no foundation for the courts, *when passing upon rights vested under the earlier laws, whose consummation had been for a series of years prevented by the tardy action of the surveying department, to endeavor to provide any like remedies by*

judicial legislation, especially for such evils as are the natural result of this very tardiness on the part of the government. These earlier laws, like that of 1830, were of short duration, and when a right accrued under any of them it was not possible for the land to which it attached to be kept in a dubious condition as to the intention of the pre-emptor to consummate it or not for an inconvenient time. Under these laws, if he did not make his proof and payment within the short time provided, his right was forfeited. And it is most reasonably to be supposed, that for the advantages that the government proposed to reap from these laws, she was willing to submit to the inconvenience of extending to the pre-emptor the privilege of making his election to consummate his right or abandon it at his pleasure up to the last moment. Hence the only abandonment or forfeiture that was probably contemplated, was that which was evidenced by a failure to make proof and payment within the time prescribed by the law, and the usages in the General Land Office seem to have conformed to this idea. Even in cases where the pre-emptor had equal right, by virtue of cultivation and possession, to several tracts of the public land, he was not held to have abandoned either until he had made his election, although at the last moment.

"The words used in the act in question, 'every settler or occupant of the public lands,' are sufficiently broad to embrace aliens as well as citizens, and, administering it, the Land Department made no discrimination, and even extended it to free negroes, when the laws of the State in which they claimed pre-emption allowed them to buy lands. And hence, although Mrs. Taylor might have been an alien when her pre-emption right was consummated by grant, she had, without the aid of any statute, capacity to take and hold lands until forfeiture in office found. *But when her right in this case vested, she was indisputably a citizen, and the grant would relate to that time.*

"And if, after the vesting of her right, and before it was consummated by grant from the Federal Government, she, by the double operation of her own will and the assent of the Federal Government, had become an alien, that would not have worked a forfeiture of the right *so already vested.* This we understand to be the general principle of law applicable to the point.

"We have been unable to perceive the force of the distinction taken by counsel between a right and a title, as an avoidance of the effect of these principles of law. They are,

perhaps, not entirely convertible terms, because the one savors more of the substance and the other more of form. The right, however, may exist in equity, while the title, when acquired, would be the legal evidence of the right, one when emanating from the government, after various acts following the vesting of the right, and all in consummation of it, as in this case, the issuance of the patent would relate to the *time of the vesting of the right,* as between the government and the grantee; and so, also, doubtless, as between the grantee and others not having intervening rights founded upon law." (Italics ours.)

The doctrine declared in the above case—that the pre-emption act gave to the settler who came within its terms an immediate vested right, which could only be defeated by the failure to perform the conditions subsequent, named in the act itself—has been affirmed by the Supreme Court of the United States in a number of cases.

In the case of *United States* v. *Fitzgerald,* 15 Peters, 418, the Supreme Court of the United States, in a contest between the government and a pre-emption claimant under the act of 1830 (4 Stat., 420), as extended by the act of 1834 (4 Stat., 488), was called upon to consider the character of the right granted by that pre-emption act, which, as above stated, was similar in its essential provisions to the act of 1826.

In that case the Secretary of the Treasury attempted to declare a reservation of the land after the pre-emption right had accrued. The court held:

> "As no reservation or appropriation of the land, made *after the right of the defendants accrued* under the act of June 19, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation." (Italics ours.)

See *Barnard* v. *Ashley,* 18 How., 43.

In *Lytle* v. *Arkansas,* 9 How., 314, the Supreme Court declared in terms that the pre-emption right given by the act of 1830 was a *vested right* which could not be defeated by subsequent grants or other acts.

In that case a man named Cloyes claimed the right of pre-emption to a certain tract of land in Arkansas under the act of

1830, by virtue of a settlement made prior to 1829. On 15 June, 1832, before Cloyes proved his claim, Congress granted to the State of Arkansas one thousand acres of land, to be located by the Governor, and on March 2, 1833, a location was made, including the land *afterwards* claimed by Cloyes.

The officers of the Land Department refused to recognize the pre-emption right claimed by Cloyes, and patents were issued to the Governor of the State and his assignee, and improvements were made upon the land by their vendees.

A suit was brought by Cloyes to establish his right to the land, and the Supreme Court held that by virtue of his settlement prior to 1830, the act of 1830 gave him a vested right which could not be interfered with by the grant to the State of Arkansas.

In speaking of the claim, the court used the following significant language, which we have already quoted, but which is so applicable it will bear a repetition:

> "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But, when covered by law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it. It is founded upon an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer who is found in advance of our settlements encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is a national feeling is shown by the course of legislation for many years."

In discussing the case further the court said:

> "By the grant to Arkansas, Congress *could not have intended to impair vested rights.* The grant of the thousand acres, and of other tracts, must be so construed as not to interfere with the pre-emption of Cloyes." (Italics ours.)

In the case of *Brown's Lessee* v. *Clements,* 3 How., 666, cited with approval in *Lytle* v. *Arkansas, supra,* the court speaks of a pre-emption act as such an appropriation of land as to remove the

same from the operation of subsequent grants or claims. The court says:

> "The act of the 29th of May, 1830, appropriated the quarter section of land in controversy on which Etheredge was then settled to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions."

In *Barnard* v. *Ashley,* 18 How., 43, 45, the Supreme Court, in speaking of the decision in *Lytle* v. *Arkansas, supra,* said the land was decreed to "Cloyes, the claimant, this court holding his claim to the land to have been a legal right *by virtue of the occupancy and cultivation,* subject to be defeated *only* by failure to perform the conditions of making proof and tendering the purchase-money."

See also *Hall* v. *Pipin,* 24 How., 132.
Bryan v. *Forsythe,* 19 How., 334.

These decisions by the highest courts would seem to be conclusive as to the vested character of the right or interest granted by the pre-emption act of April 22, 1826. We will refer to only one other authority construing an analogous act in which the early pre-emption acts are discussed, and which is so directly in point that we ask a careful consideration thereof by the court.

The case to which we refer is *Johnson* v. *United States,* 2 Ct. of Cl. Repts., 391, decided in 1866.

This cause arose under the Oregon Donation act of September 27, 1850 (9 Stat., 496), which act granted actual settlers on the public lands prior to September 1, 1850, a donation of 320 acres to a single man, being based upon the same principle as the early pre-emption acts—namely, a reward for settlement and cultivation.

In July, 1850, the claimant, Johnson, made a settlement at a point on the Columbia river and erected his improvements.

In 1856, before a survey of the land had been made, and before the patent was issued, when the claimant's right, in the language of the court, "rested entirely upon his four years' continued residence and cultivation and previous notification," a detachment of United States troops ejected him from his settlement, and

established thereon a military post. Johnson insisted that he had acquired a vested right to the land by virtue of the Donation Act, and, after many years of litigation, this claim was recognized and confirmed by the decision of the Court of Claims of the United States.

In discussing the nature of the right given by the act, the court held that it was similar in every respect to the right given by the *early pre-emption acts,* and, at page 411, uses the following pertinent language with reference to these early acts:

> "A distinction has been suggested between the case of Fitzgerald and the case at bar. The decision of the Supreme Court related to the act of the 29th of May, 1830 (4 Stats., 420), which was a pre-emption act and exacted money from the settler; whereas, under the Oregon act, no money was exacted, and the grant was termed a donation. But there were several reasons for holding that under the Oregon, or 'Donation act,' the settler acquired *an equitable title by virtue of his four years' residence and cultivation;* and for saying that the decision of the Supreme Court is decisive and obligatory here. In the first place, the payment of money was only *a part of the consideration given by the grantee under the pre-emption acts.* There, as here, he was required to *occupy and cultivate.* There the grant was restricted to even a smaller tract than was here given, and the *policy* and *chief end* of the statute as of this, was to *foster the advance of civilization into the uninhabited and useless portion of the national domain.* The Donation Act was only an advance on the same line of national policy, and the patent which it promised was *not a naked gift,* but a grant upon a *present consideration, received and accepted by the grantor. This consideration was just as valid and binding on the government as the other, for in the eye of the law services are as sufficient a consideration to support a grant as money, or as services and money.*" (Italics ours.)

See also *Lamb* v. *Davenport,* 18 Wall., 307.

The facts of the Johnson case were very similar to the Hackley claim, and the language of court could not have been more applicable if this case had been under consideration. It would seem to be conclusive as to the vested character of the right or equitable title given by the early pre-emption acts.

We have thus far considered only those authorities arising under the act of 1826, or statutes identical in terms or principle. There are other lines of authorities construing acts analogous to these early pre-emption acts, which are instructive, but which cannot be reviewed within the limits of this brief. We refer to acts confirming the rights of settlers upon lands acquired from other governments, the Swamp Land Grants, and acts of a similar character, giving to settlers a preference right in the purchase of lands upon which they had settled, or an equitable interest in or title to the land, subject to confirmation and patent. See, as illustrations, acts of February 21, 1833, 3 Stats., 724; act of May 15, 1820, 3 Stats., 605; act of June 13, 1812, 2 Stats., 748; act of March 23, 1823, 3 Stats., 773.

It has been decided in numerous cases that these acts were grants in *presenti* of an equitable title to, or interest in the land, which could afterwards be perfected into a legal title by necessary proof and patent from the United States.

Morrow v. *Whitney*, 95 U. S., 551.
Bryan v. *Forsyth*, 9 How., 334.
Carondelet v. *St. Louis*, 1 Black, 179.
Glasgow v. *Hortiz*, 1 Black, 595.
Savignac v. *Garrison*, 18 How., 132.

The granting terms in the acts referred to in these cases are the same, or substantially the same, as those in the acts of 1826 and 1813, under which the complainants claim, and the authorities by analogy sustain our contention that the acts of 1826 and 1813 were grants in *presenti* to certain classes of persons named therein of a vested equitable right to, or interest in, the lands settled, inhabited and cultivated by them, as described in the acts. Such acts would be meaningless, however, if the rule of construction followed by the department, of applying to these early acts the authorities construing the modern pre-emption acts, had been adopted by the department or the courts in determining the rights of claimants thereunder.

The view of these statutes taken by the courts may be seen by reference to the case of *Glasgow* v. *Hortiz*, 1 Black, 595.

There the act of June 13, 1812 (2 Stats., 748), entitled, "An

act making further provision for settling claims to land in the Territory of Missouri," was under consideration, and the court said:

"The construction of the act of 1812 has been so often before the courts of Missouri and this court that it would be tedious to refer to the cases. The case of *Guitard* v. *Stoddard,* 16 How., 508, need only be cited, as it contains a review of previous decisions. We there decided 'that the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act'; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish Government. That the act makes no requisition for a concession, survey or permission to settle, cultivate or possess as a basis of the right, title or claim upon which its confirmatory provisions operate. No board was appointed to receive evidence, or authenticate titles, or adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals."

So in the case at bar. Congress, in its discretion has seen fit to grant to "any person" who did *in fact* settle and cultivate a tract of land in Florida before January 1, 1825, an equitable interest in such land, and prescribes a simple means by which it could be perfected into a legal title. The courts cannot read new provisions into the act, or raise new conditions to defeat the obvious and beneficent intent of Congress.

In the light of contemporaneous construction of the acts of 1826 and 1813 by the Land Department, of the decisions of the highest courts, both State and Federal, which have been cited, and of authorities construing analogous acts based upon similar principles, it is respectfully submitted that the proposition is conclusively established that the pre-emption act of April 22, 1826, gave to the settlers upon the public lands in the Territory of Florida, who settled upon and cultivated the same prior to the 1st of January, 1825, a vested right of pre-emption in the purchase thereof, or an immediate equitable interest in or title thereto, in consideration for labor and services in opening up the public lands, which right or title related back to the date of settlement, and could only be divested by forfeiture for failure to perform the condition subsequent named in the act; and that

such rights and interests of the early settlers have been uniformly favored and protected by every department of the government.

The Secretary of Interior, in his decision of November 25, 1892, and counsel for the appellees in the court below, have cited and relied upon a number of modern cases, such as *Frisbee* v. *Whitney*, 9 Wall., 187; *Yosemite Valley Case*, 15 Wall., 77; *Shepley* v. *Cowen*, 91 U. S., 330; *Rector* v. *United States*, 92 U. S., 698; *Atherton* v. *Fowler*, 96 U. S., 513; *Moore* v. *Robins*, 96 U. S., 530, and *Buxton* v. *Travers*, 130 U. S., 232. These cases are cited in support of their contention that under the pre-emption law no right or interest can vest until the land has been surveyed, proof made and the purchase-money paid.

With one exception (*Rector* v. *United States*, 92 U. S., 698), all of the cases cited arose under and involved the consideration of the pre-emption act of 1841 (5 Stats., 543), which, as we have seen, was entirely different in terms and in principle from the pre-emption acts passed prior to that date.

The act of 1841 was limited by its terms to *surveyed lands*, and, therefore, no pre-emption claim could be established under that act except to lands which had been surveyed.

The act of 1841 provided in terms that persons who *thereafter* settled, inhabited and improved a tract of land were authorized to enter the same with the Register, thus, by the terms of the act, only giving the right upon the performance of conditions precedent, and it necessarily follows, as was stated by the Supreme Court in the cases cited above, that no right could vest under this act until the conditions precedent had been performed. This would seem too clear for argument.

On the other hand, the act of 1826, under which the complainants claim, was not limited by its terms to surveyed lands, but by its very terms and the facts and circumstances existing at the time necessarily referred to *unsurveyed* lands, and this is clearly shown by the fact that in the act of 1813, made a part of the act of 1826, reference is made to survey lines run *or to be run*.

The act of 1826 did not, like the act of 1841, give the right of pre-emption to some person in the future when certain conditions precedent had been performed, but gave an *immediate*

right of pre-emption to persons who had prior to the date fixed in the act already performed the conditions of settlement and cultivation, and, therefore, vested in the beneficiary of the act an immediate interest in consideration of past settlement and cultivation, subject only to forfeiture for failure to perfect this equitable interest into a legal title in accordance with the terms of the act.

A consideration of these differences in the terms of the different acts is a complete and sufficient answer to the contention of counsel for appellees based upon the case of *Frisbee* v. *Whitney*, and other cases cited *supra*. We admit, once and for all, that neither under the terms of the act of 1841, nor under the authorities construing that act, could any vested right or interest be acquired by the pre-emption claimant until the conditions precedent named in the act had been performed; but we insist, with all earnestness, that claims arising under the act of 1826 cannot be governed by the provisions of the act of 1841, nor can the rights of claimants under the act of 1826 be tested by or governed by authorities construing the act of 1841.

It will be further noticed that in the case of *Frisbee* v. *Whitney*, *supra*, and in many of the other cases cited, the question involved was the right of the *United States* to reserve or dispose of land, as against the pre-emption claimant who had not perfected his claim under the act of 1841; or, in other words, it involved the validity of a pre-emption claim where the conditions of the act of 1841 had not been performed as against the government of the United States itself. The Supreme Court, in *Frisbee* v. *Whitney*, and in *Yosemite Valley* and other cases, held that while this pre-emption right under the act of 1841, based only upon cultivation and settlement, where the other conditions required by the act had not been performed, was not vested as against the government, yet even under this act the cultivation and settlement gave a prior right as against other claimants which the courts would protect and enforce.

In the case now before this court, there is no contest between the government and the Hackley heirs—the government is no longer interested—but it is between private individuals, where prior settlement and cultivation on the part of Hackley is admitted. Even, therefore, if this case be tested by the authorities

construing the act of 1841, against which we most earnestly protest, and for which we insist there is no reason or authority, yet in such a case the claim of the legal representatives of Hackley, based upon a prior settlement and cultivation, should be protected against subsequent claims of speculators, who have come in to take this land when it became valuable, and when settlement was no longer accompanied by danger or difficulty.

We do not deem a further examination of the authorities above referred to necessary at this point, with the exception of the case of *Rector* v. *United States,* in which claims under the acts of April 12, 1814, and May 29, 1830 (which were similar in their general provisions to the act of 1826), are construed.

These cases, commonly known as the *"Hot Springs Cases,"* involved a controversy between pre-emption claimants and the United States Government. The government had undertaken, by congressional act, to reserve several sections of land, embracing the Hot Springs, Arkansas, from disposition, and persons who had settled on this land undertook to assert their claims against the United States. As we have seen, this fact, in itself, is sufficient to distinguish the cases from that now under consideration, for, as the courts have universally held, a claim may be good as against individuals which may not be good against the *United States.*

Frisbee v. *Whitney, supra.*

However, the court itself has distinguished this group of cases from the authorities which we have cited in support of our contention, and has based its decision upon the peculiar facts of each case.

Mr. Justice Bradley rejects the Hale claim, (1) on the ground that the Indian title had not been extinguished (page 703), and (2) upon the conclusive finding (page 705) that the settlement upon which the claim was based did not *come within the act of* 1814, under which the claim was initiated.

The Gaines claim (page 705) was rejected upon the ground (page 706) that at the time the land was reserved by act of Congress there was no act in force under which the pre-emption claim could have been initiated; that the act of 1830 expired

at the end of one year, and before it was renewed in 1832, an act of Congress had been passed reserving this land from sale or entry. The court refuses to decide whether, under the act of 1830, a vested right could be set up against the Government before entry and location, but decides that this claim would be invalid, "even if a vested right could be set up against the government before entry and location." The Rector claim was rejected upon its peculiar facts, which need not be noticed, as it involved a claim under New Madrid script.

We submit that this brief review of the cases relied upon to meet our contention with respect to the act of 1826 is sufficient to show that these authorities can have no bearing upon the claim now before this court. On the other hand, it is submitted that the act of 1826, as construed by contemporaneous authorities, executive and judicial, gave to Robert J. Hackley and his legal representatives, by virtue of his settlement and cultivation prior to the 1st of January, 1825, a vested right of pre-emption in the purchase of said tract of land, which, under the terms of the act and under the construction given by the authorities cited by us, was a vested equitable title in, or to, said tract of land as of the date of the passage of the act, which right or title related back to the date of the settlement, and could only be forfeited by failure to comply with the conditions subsequently named in the act by which this equitable title was to be perfected into a legal title.

We shall show hereafter that Hackley and his legal representatives have fully complied with the conditions subsequent named, and that the United States has never attempted to enforce any forfeiture.

With our position, and the principal authorities in support thereof, thus before the court, let us next consider in their order the several grounds upon which the demurrants contend that Hackley, or his legal representatives, never acquired any right to said land.

III. Does the Act of March 3, 1807, Affect the Rights of the Complainants in these Causes?

The specification of demurrer based upon the act of March 3, 1807, is set out as section 1 of the first demurrer (p. 79), as follows:

> "The alleged settlement and cultivation by Robert J. Hackley of the lands involved, in 1823 and 1824, did not confer upon or vest in the said Robert J. Hackley any right or lawful claim to any part of the lands described in complainants' bill, *because such entry upon and possession of said land was without authority of law, and in direct violation of the acts of Congress* in force in the State of Florida at that time." (Acts of March 3, 1807, 2 Stats., 445; Act of March 30, 1822, 2 Stats, 645.) (*Italics ours.*)

The act of March 30, 1822, simply makes the act of March 3, 1807, applicable to the Territory of Florida.

This specification comprehends that contained in the sixth section of the joint demurrer (page 80) in the following language:

> "It does not appear from the allegations of the complainants' bills that Robert J. Hackley was ever in *lawful possession or occupancy* of the said lands described in said bill, or any part thereof."

The complainants claim under the act of April 22, 1826. That act does not require *"lawful"* possession or occupancy, but simply *"actual* settlement," etc. Upon what principle, therefore, can it be contended that the complainants shall allege or establish "lawful possession or occupancy" ? In *Newhall* v. *Sanger,* 92 U. S., 765, the Supreme Court said, in speaking of another statute:

> "This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed; but there is no authority to import a word into a statute in order to change its meaning."

Glasgow v. *Hortiz,* 1 Black, 595.

So in this case the court cannot read into the act conditions which it did not contain, so as to change its meaning, especially when, as we shall show hereafter, the language used was employed with special reference to the facts and circumstances existing at the time.

In the consideration of the ground of demurrer, section 1, as above set forth, it becomes necessary, at the outset, to determine the scope and intention of the act of 1807, and whether or not the same affects the rights of the complainants in this cause. Section 1 of this act contains the following provisions:

> "That if any person or persons shall, after the passing of this act, take possession of or make a settlement on any lands ceded or secured to the United States by any treaty made with a foreign nation or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased by the United States, or the claims to which lands by such person or persons shall not have been previously *recognized* or *confirmed* by the United States; or, if any person or persons shall cause said lands to be thus occupied, taken possession of or settled, or shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereon by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders *shall forfeit all his or their right, title or claim, if any he has, or they have, of whatsoever nature or kind, the same shall or may be to the lands aforesaid,"* etc.
>
> . . . "And it shall moreover be *lawful* for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed; and also to take such other measures and employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make, a settlement thereon until thereunto authorized by law. And every right, title or claim forfeited under this act shall be taken and deemed to be vested in the United States without any other or further proceedings." (Italics ours.)

The second section provides that actual settlers who had made settlements before the passage of the act might remain on the public land as tenants at will of the United States, upon terms

to be fixed by the Secretary of the Treasury, with the approbation of the President, and upon condition that they would whenever the tract of land might be sold or ceded by the United States, or whenever the United States might require them to do so, give quiet possession of such tract or tracts of land to the purchaser or purchasers, or remove altogether from the land, as the case may be. This section also provided that such settlers should, upon being required so to do, sign a declaration stating that they made no claim to the land, and did not occupy the same by virtue of any claim or pretended claim, *derived, or pretended to be derived, from any other person or persons.*

The fourth section provides "that it shall be *lawful,* after the first day of January next, for the marshal, or proper officer acting as marshal, under such instructions as may for that purpose be given by the President of the United States, to remove from the land aforesaid any and every person who may be found on the same, and who shall not have obtained permission to remain thereon as aforesaid," and providing for three months' notice to such persons that they would be required to remove from the lands, and penalties for their refusal to remove after such notice.

When this act is examined in the light of the conditions existing at the time of its passage, and the policy of the government at that time with respect to the disposition of the public lands, and contemporaneous authorities, it becomes perfectly clear that it was not intended to affect persons who went upon the public lands and made *bona fide* settlement for the purpose of securing a home, and who *did not claim any legal right to the land so settled upon until such right should be conferred by Congress.* It will be noticed that the first section does not make such settlers upon public lands *wrong-doers* in the real sense of that term, but simply provides that they shall *forfeit any right, title or claim* which they may have to the lands settled upon, and that such forfeited rights shall *vest in the United States.* It should further be noticed that it does not *require* the President of the United States to remove such persons from the public lands, but declares that it shall be "lawful" for the President to remove these settlers; and the fourth section provides that it shall be "lawful" for the marshal, under instructions from the President, to remove per-

sons who have settled upon the public lands contrary to the provisions of the act. It was, therefore, left to the *discretion* of the President whether he would or would not remove such settlers, and an examination of the language of the act and its provisions, as a whole, shows clearly that the sole purpose and intent of the statute was to retain in the United States complete title to the public lands until Congress, in which was vested by the constitution the sole right to dispose of such lands, should see fit to make disposition of the same.

Early in the century numerous claims were made to large portions of the public domain by persons claiming, under alleged grants from various sources. Some of these claims were under alleged grants from the original thirteen States—a peculiarly troublesome class being the "Georgia titles," in the Yazoo territory, as to which there was a long controversy between the United States Government and the State of Georgia and its grantees. Others were under alleged grants from foreign governments, such as "French grants" in the Louisiana Territory and "Spanish grants" in Florida (Donaldson Pub. Domain, *passim*). These claimants would go upon the public lands, locate their alleged claims by survey or otherwise, and make sales to settlers, with resulting difficulties to the United States Government, and hardships to those who had purchased lands under fictitious titles. Some of these claims were valid, others were not. It was important, therefore, for the protection of the interest of *bona fide* claimants, and in order to avoid trouble with others, that no settlements should be made under these alleged grants, or claims located, until such claims could be passed upon by the government, and the rights of all parties adjusted. This was essential in order to keep the disposition of the public lands under control of Congress, where the Constitution had put it.

As early, therefore, as 1802 Congress passed an act prohibiting settlements upon the public lands in the Louisiana Territory, and the act of 1807 was but an extension of the same prohibition to other public lands to prevent the location of fraudulent claims then so prevalent.

It was with these claims in view that Congress declared that no settlement or survey should be made until the claim was "recog-

nized" or "confirmed"; that the "offender" should "forfeit" all his *right, title* or *claim,* and that the same should be deemed to be *"vested in the United States,"* etc., thus forever ending his alleged claim. Neither the reason of the statute nor its language was applicable to the *bona fide* settler, who went upon the public lands for the purpose of establishing a home, but claimed no title until the same should be conferred upon him according to law. He was not an "offender," but belonged to a class which it has been the policy of every department of government to encourage and protect. He could not "forfeit" his claim or title, because he made no claim, and acquired no title, until his settlement had been "covered by law." (*Lytle* v. *Arkansas*, 9 How., 314.)

It may be further noted that there is a rule of construction so elementary that the citation of authority in its support is unnecessary, that where there are *two statutes* bearing upon the same subject, and one does not in terms repeal the other, they should, if possible, be so construed as to give effect to both, and if they cannot be reconciled, the last act will prevail.

Between 1807 and 1841 there were fifteen pre-emption acts passed for the benefit of persons who had settled on the public lands ahead of surveys while the act of 1807 was in force. The construction of the act of 1807, for which we contend, does not bring that act into conflict with the subsequent pre-emption acts referred to, while the construction given the act of 1807 by the Interior Department and the demurrants would be in effect to nullify these pre-emption acts. The courts will not adopt such a construction, especially when the historical facts and circumstances, as well as the language of the act itself, show that the act of 1807 was not intended to affect *bona fide* settlers, who made no claim to the lands except under the laws of the United States, but was only intended, as its terms indicate, to apply to persons claiming under alleged grants or authority from other sources. (*Glasgow* v. *Hortiz*, 1 Black, 595.) If, however, the construction of the department were adopted, the pre-emption acts being subsequent in date, would, of course, prevail, and the act of 1807 could not be construed as affecting the rights of persons covered by these acts.

We are not, however, dependent alone upon these general rules

of construction and the terms of the act, but have the contemporaneous construction of the different departments of government.

It is settled law that in construction of statutes the courts will give great, and even controlling weight, to the contemporaneous construction of executive officers.

In *United States* v. *Philbrick,* 120 U. S., 52, 59, the rule is stated as follows:

> "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not to be overturned."
>
> *Hahn* v. *United States,* 107 U. S., 405.
> *Brown* v. *United States,* 113 U. S., 571.

In *United States* v. *Johnston,* 124 U. S., the same court speaks of this principle as "the rule often announced by this court that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

> *Edwards* v. *Darby,* 12 Wheat, 206.
> *United States* v. *Moore,* 95 U. S., 760.

On October 25, 1808, a little more than a year after the passage of the act of 1807, the Secretary of the Treasury, who then had charge of the public lands, wrote to Thomas Freeman, deputy surveyor of the United States for the Missouri Territory, construing the purpose of the act of 1807 as to settlers upon the public lands in that territory which had not been surveyed. (2 Pub. Land Laws, Insts. and Orders, 272.) After stating the terms of the act of 1807, and discussing the subject at some length, the Secretary says:

> "You will easily perceive that the great object of the President is to discriminate between settlers who lay no claim to the land, *and will either become purchasers* or quietly submit to the laws, and those who under pretense of *pretended titles* intend either forcibly to occupy the lands

> or to *extort money from ignorant settlers.* Against the last description the President intends to cause the law to be rigorously carried into effect, both by prosecuting for the penalties and removing them by force." (Italics ours.)

Again, on March 9, 1830, in the instructions from the Commissioner of the Land Office to the receiver at Huntsville, Ala., 2 P., L. L. I. and O., 422, the Commissioner discusses at length the provisions and application of the act of 1807. Among other things he says:

> "In now enforcing the provisions of the act of 1807, it is not the intention of the President to disturb those settlers who may occupy lands formerly purchased from, but subsequently relinquished or forfeited by them to the United States, or those persons who *lay no claim to the lands they occupy, and who intend to become the purchasers of them, or submit quietly to the laws and yield possession whenever required by the proper authority;* but understanding that settlements have been or will be made by persons who intend to hold or claim possession of the lands under color of *alleged grants or title from the State of Georgia,* and against whom it is intended to have the provisions of the law carried into rigorous effect, he has decided upon the course now directed to be pursued, in order that the settlers, who will sign the declaration before referred to, may obtain the means of securing themselves against the effects consequent upon the enforcement of the laws respecting unauthorized settlements upon public lands." (Italics ours.)

In these two cases, and others which might be cited if necessary, we have the positive construction of the Executive Department that this act of 1807 was not to be applied to *bona fide* settlers, but to claimants under alleged grants, and titles which the United States Government had not recognized or confirmed.

We appreciate the rule that a court will not be governed by the debates pending the passage of an act in its effort to determine the intention of the legislative branch of the government in its construction thereof, but such debates may frequently aid the court by placing it in possession of contemporaneous facts and conditions existing and under consideration of the legislative body when the act was passed.

In this view, and because of the great ability of Mr. Joseph M. White, delegate from Florida, patron of the bill, and one of the

most eminent land lawyers of his day, we submit, for the consideration of the court, extracts from his remarks upon the pending bill, which became the Florida pre-emption law of 1826, under which complainants claim, and the bearing thereon of the act of 1807, now under consideration. Nor can our contention be more aptly expressed than by the language of Mr. White.

In the *Congressional Debates for* 1825–'26, Vol. 2, Part I., pp. 1422 to 1436, inclusive, will be found the debates upon the act of April 22, 1826.* On February 21, 1826, when the bill was under consideration in the House, Mr. White spoke at length, explaining its purposes and the necessity for its passage. At page 1423 he says:

> "Previously to making a particular reference to those laws, it might remove some obscurity, and obviate some objection, to notice a misapprehension of many gentlemen in regard to settlements upon the public lands.
>
> "It has been alleged that the existing laws forbid settlements upon the public lands, and denounce heavy penalties against all such intruders who were located there without authority, and some called them squatters, which, so far as it is intended as either descriptive or derogatory, was entirely unjustifiable. These inhabitants are small planters, whose lands in the old States have been exhausted by cultivation, and who, animated with the laudable desire to improve their condition and that of their rising families, have encountered all the hardships of penetrating to the borders of the country, disregarding the difficulties of the journey, and unappalled either by the labors of the forest or the enemy in its bosom. Any imputation upon their motives, or question of their right, would be the strongest censure upon our forefathers, who settled this continent influenced by these same praiseworthy considerations. A more respectable population is not to be found in any of the States. If, however, sir, there was a law of the United States interdicting settlements upon the public lands, I could plead as an excuse for that the uniform legislation of Congress regarding its violators, and quote the old maxim, '*communis error facit jus.*' He was fortunately, however, not reduced to such an alternative. The law does not prohibit such settlements, and he would show that the act of 1807, which was considered the basis of such exclusion, did not embrace this class of settlers;

* These debates, so far as applicable, are printed as an Appendix to brief.

and if it had, the law was practically repealed. That act, which is entitled an act 'To prevent intrusions upon the public lands,' provides that if any one shall take possession of, or attempt to survey, lands ceded to the United States, he shall forfeit his claim, and the President may remove him by force. This law was passed not long after the cession of Louisiana to the United States, *and its evident object was to prevent surveys of large claims, the validity of which were doubted, and to prohibit those having unlocated, floating permits from surveying and settling upon the best lands of that rich territory;* and thus they employed the phraseology 'forfeit his claim.' The government were desirous of prohibiting by force, if necessary, the location of these *floating and fraudulent claims,* that the occupancy of them after the change might not be pleaded as a prescriptive right. *It never was and never could be the intention of that law, or any other, of the United States, to prohibit settlements upon the public lands.* (Italics ours.)

On February 22, 1826, the bill being again under discussion, Mr. White, in speaking in favor of the same, said (p. 1433):

"The inhabitants whose rights were intended to be secured by the passage of this bill were not trespassers. The act of 1807, entitled 'An act to prevent intrusion upon the public lands,' was passed shortly after Louisiana was surrendered to the United States. There was at that time numerous unlocated claims derived from the Spanish and French governments, founded on permits, requests and floating concessions. *That act was intended to prevent the location and survey of those incomplete titles,* and at the same time to authorize the President of the United States to preserve by force, if necessary, not only the domain as this government acquired it in the treaty with France, but also to invest him with discretionary power to prevent these locations of claims, many of which were considered invalid, and in the hands of those who did not intend to become citizens of the United States, the pretext for locating which might *have led to serious disturbances in the condition that the country was in at that time. It never was either the intention or policy of the government of the United States to prohibit settlements upon their vacant lands. On the contrary, they have encouraged it by a long-continued system of legislation, both before and after the act to which alone the gentleman must refer in pronouncing them trespassers."* (Italics ours.)

At the conclusion of this speech the question was taken and the bill was passed without a dissenting vote, so far as the record shows, the House thus adopting and approving the grounds urged by the speaker in its favor.

In the case of *Wynne* v. *Morris*, 16 Ark., 414, 424, 434, the Supreme Court of Arkansas has declared, in effect, that the act of 1830, which was not so broad in its provisions as the act of 1826, gave the pre-emption right to settlers upon the unsurveyed public lands who came within its provisions, notwithstanding the act of 1807, or any other act prohibiting the settlement upon the public lands. In that case Mrs. Taylor, who claimed the pre-emption right, had gone upon the public lands long before they had been surveyed, before the act of 1830 was passed. Ten years afterwards, although she had removed from the United States, she returned and claimed her pre-emption right, and the Supreme Court held that the right became vested under the act of 1830, although the settlement had been made before the survey of the lands. At the time the settlement by Mrs. Taylor was made, the act of 1802, *expressly prohibiting settlement upon public lands in Louisiana Territory*, of which Arkansas was a part, was in force, and the act of 1807 *was in force as regards all the public lands of the United States.*

See also *Lytle* v. *Arkansas*, 9 How., 314.

In the light of these authorities, showing the contemporaneous construction of the act of 1807, it is submitted that this act never had any reference to *bona fide* settlers who established their homes upon the public lands with a view to acquiring title from the United States by purchase or under future pre-emption acts, not with intent to violate the law or to claim under some *fictitious or unlawful title;* that if this act ever applied to such settlers, which the authorities clearly show it did not, yet the act of 1826, under which the complainants claim, being of a later date than the act of 1807, nullified the act of 1807 *as to settlers upon the lands in Florida*, and conferred the pre-emption right upon all persons who had *actually* made such settlements in said Territory prior to January 1, 1825.

See, in this connection, *Glasgow* v. *Hortiz*, 1 Black, 595, and cases cited.

IV. The Contention of the Demurrants, that Hackley Acquired no Pre-emption Right by Virtue of his Settlement and Cultivation in 1823–'24, Because the Act of April 22, 1826, was not Retroactive, and did not Apply to Settlers upon the Unsurveyed Public Lands.

The specification of demurrer stating this position is found in section 2 of the joint demurrer (page 79), as follows:

> "The act of April 22, 1826, giving the right of pre-emption to settlers upon lands in Florida, pursuant to the terms and provisions of the act of February 5, 1813, did not and could not have a retroactive effect upon the unlawful possession of the unsurveyed lands described in the complainants' bills by Robert J. Hackley, because the said acts referred to surveyed lands of the government, and were not intended to confer pre-emption rights in unsurveyed government lands."

We have already discussed the question of alleged unlawful possession at length in connection with the act of 1807.

It may be further noted that the act of 1826 did *not require* that Hackley should be in *possession* at the time the act was passed, *or on the 1st of January*, 1826, but simply required that he should have in fact "inhabited and cultivated" said tract of land *prior to January* 1, 1825. The courts cannot read into the act conditions which it does not contain.

Newhall v. *Sanger*, 92 U. S., 765.
Glasgow v. *Hortiz*, 1 Black, 595.

The specification of demurrer raises two questions: First, was the act intended to be retroactive, so as to operate upon settlements made in 1823–'24; and, second, did the act of April 22, 1826, apply to settlements upon the unsurveyed public lands?

It would seem to be too plain for argument that the act of April 22, 1826, was *wholly* retroactive in its character and effect. It gave no right to persons who made settlement upon the public land *subsequent* to its enactment, or subsequent to the *1st of January*, 1825, but provided "that every person, or the legal

representative of any person, who . . . *did on or before the first day of January, in the year one thousand, eight hundred and twenty-five, actually* inhabit and cultivate a tract of land situated in the Territory of Florida, . . . shall be entitled to the right of pre-emption in the purchase thereof," etc.

Under the terms of the act, therefore, only persons who had made settlement and cultivation *prior to the first of January,* 1825, which date was fifteen months *before* the passage of the act, could derive any benefits from its enactment. The act only applied to *past settlements;* was, of course, purely retroactive in its effect, and, as we have seen, Hackley coming distinctly within its express terms, and within its intent, it must necessarily operate upon his settlement, as well as other settlements made prior to the 1st of January, 1825, unless excepted by the terms of the act itself.

By reference to the contemporaneous authorities of both the executive and judicial departments of government, it will be found that their construction of these early pre-emption acts was in accord with the above suggestions. The proposition would seem to be so plain, however, that we will not weary the court with a review of these authorities.

This act provided that the persons coming within its terms "shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect as are directed by the act" of February 5, 1813. The last-named act, therefore, became incorporated into the act of 1826, and must be read as a part of it.

The first section provides that every person, &c., who actually inhabited, &c., a tract of land in the Illinois Territory, which tract is not rightfully claimed by any other person, &c., shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, &c., *"Provided,* That no more than one-quarter section of land shall be sold to any one individual in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run or to be run* under the direction of the surveyor general," &c.

It will thus be seen that the act expressly relates to unsurveyed as well as to surveyed land, otherwise the expression "lines *run*

or to be run" would be meaningless. This is certainly one of the "restrictions, conditions, provisions and regulations" of the act of 1813 which in express terms was to apply to Florida under the act of 1826.

But suppose the act itself contained no such provision, and no reference to surveyed or unsurveyed land. Settlements upon unsurveyed lands are not excluded, but, to the contrary, the act says. "*Every* person, or the legal representatives of *any* person, who . . . did . . . actually inhabit and cultivate a tract of land in the Territory of Florida," etc. Is there anything in this language to exclude any class of lands? To the contrary, could it be broader and more comprehensive? When we add to this the provision that the claims are to be bounded by lines run or "to be run," further discussion of the subject would seem to be idle. The courts cannot make exceptions which the Legislature has not seen fit to insert in the act.

> See *French* v. *Spencer,* 21 How., 228.
> *Yturbide* v. *U. S.,* 22 How., 290.

In view of the fact, however, that demurrants lay great stress upon the point that this land was unsurveyed at the time of Hackley's settlement, and that the Interior Department in the decision of Secretary Noble makes this fact the basis for a decision against the Hackley heirs, we deem it necessary to examine this question with some care, notwithstanding the plain provision of the act embracing every tract of land in the Territory of Florida.

It is submitted that an examination of these early pre-emption acts, including the act of 1826, and the facts and circumstances surrounding these enactments, will show that they applied, almost exclusively, to settlements upon unsurveyed public lands, that is, settlements which had been made ahead of surveys. This is peculiarly true of the settlements in the Territory of Florida.

The record shows that on March 3, 1823, Congress passed an act authorizing the President to establish a land office in each of the districts of East and West Florida, *as soon as, in the opinion of the President, there was a sufficient quantity of public land surveyed* in either of said districts to authorize the opening

of one or both of said land offices. The record further shows that the land office for the eastern district, in which the land in question was located, was not opened until 1828, showing that but little land had been surveyed in this district up to that date. The Indians were not removed from this section of Florida until 1823 and 1824. As none of the lands were, or could have been, surveyed until the Indians were removed, it follows that no surveys were made in this district before January 1, 1825; yet the act gives the right of pre-emption to any person who had settled upon "any tract of land" in the Territory of Florida. It must necessarily have referred to unsurveyed lands, otherwise it was a nullity.

In the debates upon this act, Mr. Vinton, of Ohio, the only person who spoke against its passage, declared his opposition to pre-emption acts of *any character,* and urged as one of the chief grounds for this opposition that it "retarded the sales of lands and *prevented further surveys.*" Again he says:

> "Congress are necessarily ignorant of what is taking place in that part of the public lands which lie *beyond the portion surveyed.* They do not know how many persons are engaged in seizing on the public property, and when they pass a bill like that before them, they continue ignorant of the magnitude of the *grant they have made,* until they find some of its effects interfering with the subsequent movements of the government." (Italics ours.)

Here we have a positive declaration on the part of a member of Congress, in the debate upon the act of 1826, that the pre-emption act under consideration would interfere with the surveys of the public lands, and urging as a ground against its enactment that Congress was not familiar with the conditions existing on the unsurveyed public lands, or how many pre-emption claims there might be on these lands, thus showing the existing conditions which Congress had in view.

We find this view confirmed by contemporaneous construction of these acts by the Executive Department.

On August 28, 1819, the Attorney-General was called upon for an opinion as to the effect of the act of April 12, 1814, which was identical in terms with the act of April 22, 1826, and applied to the Territory of Missouri. On April 12, 1814, Congress had

passed an act directing that the President have surveyed two million acres of land in the Territory of Missouri, which should be reserved, and set apart for military bounties. Before all of this land had been surveyed the pre-emption act of April 12, 1814, was passed. When the lands were surveyed, a question arose as to the priority of right of the early settlers upon the *unsurveyed lands,* and the beneficiaries of the military bounties. In discussing the subject, the Attorney-General says (2 P. L. L. I. & O., 147):

> "From the general language of this act the right of pre-emption *runs through the whole territory, except where the tract for which the settler contends is rightfully claimed by any other person. No such claim can,* I conceive, exist as to lands *which were vacant and unappropriated at the time of the settlement.* The military bounty lands are set apart and reserved from the time of the survey. My opinion, therefore, is that all settlers upon these lands *prior to the surveys are entitled to the right of pre-emption under the act of April* 12, 1814." (Italics ours.)

In a communication from the Commissioner of the Land Office to the Register and Receiver, February 25, 1823 (2 P. L. L. I. & O., 364), the Commissioner discusses the right of settlers upon unsurveyed public lands in the Lawrence County District, under the acts of 1813 and 1814, which were identical in terms with the act of 1826, though applicable to different territory. He says:

> "The law required these pre-emption claims to be made known before the *patents were issued,* in order that such claims might not be disturbed by the bounty lands. It is understood that all who claim pre-emption rights within the district, of land *actually surveyed for military purposes,* did make known their claims, as required, but that others who occupied *parts not surveyed,* failed to do so. . . . But where *surveys had not been executed* it would be impossible for settlers to identify their claims, so as to afford notice to the General Land Office of their particular tracts *after they had been surveyed.* Until the surveys were executed it was utterly impossible to do this, and without this identity, making known the claim was in itself perfectly useless. The law requires nothing useless; nothing impossible." (Italics ours.)

It is useless to cite other instances of the construction by the Executive Department that these laws applied peculiarly to persons on the unsurveyed public lands. We find, however, that Congress has, by express enactment, declared this to be true.

We have seen that the act of 1830 (4 Stats., 420) was similar in purpose and character to the act of 1826, though the former act was much narrower in scope than the latter, in that it contained a number of restrictions not in the act of 1826. The principal of these were:

(1) The claimant under the act of 1830 was required to be *in possession* at the date of the act. The act of 1826 contained *no such requirement.*

(2) The act of 1830 excepted from the operation of the act all *lands reserved* for any purpose whatever. The act of 1826 by reference to the act of 1813 only excepted "lands reserved from sale by *former acts*, or lands which have been directed to be sold in town lots or out lots."

(3) The act of 1830 limited the time within which the right of pre-emption therein given could be perfected *to one year;* while the act of 1826 was *unlimited as to time.*

The act of 1830, however, contained no reference to surveyed or unsurveyed lands, while the act of 1826, by reference to the act of 1813, referred in terms to lines "now or *to be run.*"

Yet when the act of 1830 had expired by its limitation after one year, it was found that a number of persons entitled to the right of pre-emption thereunder had, for various reasons, been unable to perfect their rights. By act passed July 14, 1832 (4 Stats., 603), therefore, the act of 1830 was revived and extended, and was again extended in 1834. The act of 1832 contains the following significant language:

> "That all occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress approved the 29th day of May, 1830, and who have not been, or shall not be enabled to *make proof* and *enter* the same within the time limited in said act, *in consequence of the public surveys not having been made and returned,* . . . shall be permitted to enter said lands upon the same conditions in every respect," etc.

Here is a declaration by Congress that the act of 1830 (which made no reference to unsurveyed lands) did apply to settlers upon unsurveyed public lands, and because of their inability to perfect their rights by proof and entry until the surveys were made, the operation of the act of 1830 was extended not only in 1832, but several times thereafter, in order to enable them to do so.

The same construction has been given to these acts by the courts.

In *Wynne* v. *Morris*, 16 Ark., 414, as we have already seen, Mrs. Taylor's settlement was prior to 1830; that in that year she left the country and remained away until 1841, and the lands which she claimed, by virtue of her settlement before 1830, were not surveyed *until 1841;* yet the court held that she was entitled to the right of pre-emption, although the lands were not surveyed until *twelve years after* the termination of the settlement upon which this right was based.

In *Lytle* v. *Arkansas*, 9 How., 334, the settlement of Cloyes was made prior to May 29, 1830, and his proof of settlement was made on May 20, 1831; yet the opinion states that the lands were not surveyed until *December, 1833*, and the Supreme Court declared that Cloyes was entitled to pre-emption in the purchase of this land, and sustained his claim against the claim of the State of Arkansas.

In the light of the terms of the act itself, the historical facts and circumstances, showing that practically all of these pre-emption claimants were settlers upon the unsurveyed public lands, and the authorities above cited, it would seem that the fact that the act of 1826, embracing *any tract of land* in the Territory of Florida (passed at a time when the Indians had just been removed, and before surveys could have been made) covered settlements upon the unsurveyed public lands, is beyond controversy, and if any doubt upon the subject could remain, it would be removed by the terms of the act of 1813, incorporated into the act of 1826, referring to the lines "to be run." The act of September 5, 1841, giving the right of pre-emption to future settlers upon the public lands, and establishing the general pre-emption

system, was the *first pre-emption act* which ever limited the pre-emption right to lands which had *been surveyed.*

Counsel for the demurrants, and the Interior Department, in its decision holding that this act did not relate to settlements upon unsurveyed public lands, have based their contention upon the language of Mr. Justice Miller, in *Atherton* v. *Fowler,* 96 U. S., 513, which is as follows:

> "In the early stages of our land system, no right or interest could be secured by the individual, in any public land until it had been surveyed into local sub-divisions. Nor after this had been done was it subject to sale until by proclamation of the President it was brought into the market. . . . It often occurred that emigration in advance of the readiness of the public lands for these sales had caused hundreds and thousands to settle on them, and when they came to be sold at public sale their value, enhanced by the houses, fences and other improvements of the settler, placed them beyond his reach, and they fell into the hands of heartless speculators. To remedy this state of things, the pre-emption system was established. This at first was only applicable to lands which had been surveyed, but gradually this was changed, until in 1862 pre-emptions were allowed, under proper restrictions, on unsurveyed lands, as well as those surveyed."

This language was used in a case deciding a pre-emption claim under the act of 1841, which, as we have already shown, was entirely different in theory and intent from the act of 1826, and other early pre-emption acts. In the paragraph quoted the learned Justice was simply giving a *resume* of the historical facts relative to the disposition of the public lands, which was in no way necessary to the decision, involved no exercise of judgment, and would be binding upon no one, if, when tested by the records and authorities, it were found to be historically inaccurate. When examined in the light of the point he was considering, however, it will be found to be a correct and accurate statement of the historical facts. He speaks of our "land system," and declares that in its earlier stages no rights were acquired until the land was surveyed. This is correct as to the "land system," which, as we have seen, from the beginning of the government to 1841, was a system of selling the lands at public auction, and under

this system no rights were acquired by the purchaser, and no sales made, until the lands were surveyed. He makes no reference to the *exceptions* from the general land system during this era, and no such reference is necessary for the purposes of that opinion. It is a fact, however, of common knowledge that numerous special grants were made during this era of lands which had not been surveyed, and that, as we have seen, some sixteen special pre-emption acts were passed, which were exceptions from the general system then prevailing, which acts applied especially to settlers upon unsurveyed public lands. This general language, referring only to the general land system, cannot be construed to cover exceptions from that system, either special grants or pre-emption acts. Such a construction would make the Judge guilty of an obvious inaccuracy of statement, and would attribute to him a statement in direct conflict with the authorities—executive, legislative and judicial—above cited, including the decision the case of *Lytle* v. *Arkansas,* by the same court.

Again he says, after reviewing the circumstances which led to the establishment of the pre-emption system:

> "This (the pre-emption system) at first was only applicable to lands which had been surveyed."

This statement is entirely correct, for the *pre-emption system* was not established until 1841. The early pre-emption acts which were exceptions from the system then prevailing, established no system, but were simply relief acts for the benefit of a named class of persons. The act of 1841 established the pre-emption system, and limited its operation to surveyed lands, which limitation, as the Justice states, was not removed until 1862.

If there were any doubt as to this being a proper interpretation of his language, we need only refer to the case of *Moore* v. *Robbins,* decided by Mr. Justice Miller himself, at the same term of the court, and reported in the same volume (96 U. S., 530–536), where he says:

> "In the recent case of *Atherton* v. *Fowler, supra* (page 513), we had occasion to review the *general policy* and course of the government in disposing of the public lands, and we said that it had formerly been, if it is not now, a

> rule of primary importance to secure to the government the highest prices that the land would bring by offering it publicly at competitive sales, before the right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy the act of September 14, 1841, which for the *first time established the general principle of pre-emption, and which has remained the basis of that right to this day,* while it allowed persons to make settlements upon the public lands as soon as the *surveys* were completed and filed in the local office, affixed to such settlement two conditions as affecting the right to a pre-emption." (Italics ours.)

Here we have his own interpretation of his language in *Atherton* v. *Fowler.* He states that in that case, in speaking of the early system, he was referring to "the general policy and course of the government in disposing of public lands," which course was followed "before a right to any part of it could be established by private sale or by pre-emption." Then he states that the act of 1841 established the *general principle of pre-emption,* and it was to this system that he was referring in *Atherton* v. *Fowler,* when he said that the *pre-emption system* only referred to surveyed lands.

When examined in the light of these facts and circumstances, the intent of the learned Justice, in the language quoted, becomes clear, and the entire misapplication of that language and misapprehension of its meaning by both the Interior Department and counsel for demurrants becomes equally clear. It had no reference to the early pre-emption acts, which were, indeed, not a *part* of the "general system," but *exceptions* from it, to cover special conditions, and surely should not be tortured into a declaration in opposition to the language of the early acts themselves, and to the universal construction given to those acts by the Executive Department, by Congress, and by the courts, both State and Federal, which have already been reviewed.

It is respectfully submitted, therefore—

(1) That the act of 1826 was wholly retroactive, in that it referred only to settlements made prior to January 1, 1825.

(2) That it covered settlements upon the unsurveyed public lands.

(*a*) Because by the express terms of the act of February 5, 1813, which was engrafted into and made part of the act of 1826, the lands affected were to be bounded by lines run or "*to be run.*"

(*b*) Because it embraced "any tract of land in the Territory of Florida," not rightfully claimed by any other person, and the court cannot limit this to surveyed lands only.

(*c*) Because to limit this act to surveyed lands would be a practical nullification of the act itself, in view of the fact that on the 1st of January, 1825, there were practically no surveyed lands in the Territory of Florida.

(*d*) Because, by contemporaneous construction of every department of the government, these early pre-emption acts were held to cover settlements upon the unsurveyed public lands.

(3) That the language of the court in *Atherton* v. *Fowler, supra,* has no reference to these early pre-emption acts, in that the court was referring to the "general land system," or the system of public sales prior to 1841, and to the "general pre-emption system," which meant the system established by the act of 1841, and was so interpreted by the court itself in the case of *Moore* v. *Robbins, supra.*

For these reasons it is respectfully submitted that this ground of demurrer is not well taken, and was properly disregarded by the court below.

V. Did the Ejectment of Robert J. Hackley from His Settlement by the Military Forces of the United States, and the Establishment of a Camp Thereon Prior to the Passage of the Act of April 22, 1826, Prevent Hackley from Acquiring a Right of Pre-emption in the Purchase of Said Lands?

The specification of demurrer by which this question is raised is found as section 3 of the joint demurrer (p. 80), as follows:

> "The act of April 22, 1826, making the act of February 5, 1813, operative in Florida, did not and could not have a retroactive effect upon the unlawful entry upon, and possession of, the lands described in complainants' bills by said Robert J. Hackley, for the reason that prior to the enactment of the law of April 22, 1826, the said lands had been entered upon and taken possession of by the government, and the government continued in possession thereof until the same were platted and offered for entry in 1883."

This is one of the grounds upon which the Secretary of the Interior rejected the claim of the Hackley heirs, and involves the point upon which the court below based its decision.

In the specification of demurrer above quoted, the contention against the Hackley claim is apparently based upon the allegation that Hackley was not in *possession* of the land in controversy on April 22, 1826, but that the government, through the military arm of the service, was in possession, and continued in possession until 1883.

We desire at the outset to *urge* upon the attention of the court that the act of April 22, 1826, did not require persons claiming a pre-emption thereunder to be in *possession* as of the date of the passage of the act. The sole requirement of that act was that the person should have actually "inhabited and cultivated" a tract of land situated in the Territory of Florida on or before the *first day of January*, 1825, and "should not have removed from said Territory." It follows that any person who had so inhabited and cultivated the tract of land prior to the 1st of January, 1825, and still resided in the Territory, *whether he resided on the land in question or not at the time of the passage*

of the act, came within its terms and was entitled to its benefits.

This was the construction given to the act at the time, for in a communication of the Commissioner to the Register and Receiver, May 29, 1835 (2 P. L. L. I. & O., 609), it was declared, in response to an inquiry upon the subject, that the fact that persons had removed from land *in no way affected their preemption rights,* and that there was no way to make them prove their claims before the expiration of the time fixed in the statute.

We insist that the rights of Hackley and his legal representatives must be tested by the language of the act, and not by provisions which are sought to be read into it.

This principle is elementary, has been reiterated time and again by both text-writers and decisions, and is well stated in Sutherland on Statutory Construction, Sec. 235, as follows:

> "It is the intent of the law that is to be ascertained, and the courts should not substitute their views of what is just or expedient. Courts are not at liberty to speculate upon the intention of the legislature, where the words are clear, and to construe the act upon their own notions of what ought to have been enacted. The wisdom of a statute is not a judicial question, nor can courts correct what they deem excesses or omissions in legislation, or relieve against the occasional harsh operation of a statutory provision, without danger of doing more mischief than good."

The following authorities also establish the same proposition:

Ryan v. *Carter,* 93 U. S., 78.
U. S. v. *Dickson,* 15 Peters, 141.
Mines v. *U. S.,* 15 Peters, 423.
U. S. v. *Arredondo,* 6 Peters, 691.

> "Where the legislature makes a plain provision without making any exceptions the court can make none."

French v. *Spencer,* 21 How., 288.
Yturbide v. *U. S.,* 22 How., 290.
Glasgow v. *Hortez,* 1 Black, 596.
Ross v. *Duval,* 13 Peters, 45.

We desire also to call especial attention to the fact that the act of April 22, 1826, did not except from its operation lands then in *possession* of the government, which had been settled upon

and cultivated prior to 1825. As a matter of fact, all the lands in the Territory of Florida were then in *possession* of the government, and it is an historical fact that troops were encamped throughout the Territory, in connection with the Indian troubles then existing. To except such lands from the operation of the act would render it a nullity. It would be little less than absurd to argue that the act of 1826 did not apply to lands because they might have been occupied on the date of the passage of the act by a temporary camp of troops, which might be removed the next day. At least Congress, with absolute control over public lands, made no such exception, and the court can make none.

Mr. Attorney-General William Wirt, in an opinion dated August 28, 1819 (Opinions of the Attorney-General, 211), in speaking of exactly the same language used in the act of 1814, says:

> "From the general language of this act the right of preemption runs through the *whole Territory*, except where the tract for which the settler contends is rightfully claimed by any other person. No such claim can, I conceive, exist as to lands *which were vacant and unappropriated at the time of the settlement.*"

The sworn statements of L. Thomas and others, on file as exhibits with the bill in this cause, show that these lands were vacant and unappropriated at the time Hackley made his settlement, and it was so found by the officers of the Interior Department. The lands, therefore, not being rightfully claimed by any other persons, came within the terms of the act of 1826, whether they were subject to temporary occupancy by the troops of the United States or not.

It is submitted, therefore, that a mere examination of the terms and provisions of the act of 1826 and the act of 1813, made a part thereof by reference, is a full and sufficient answer to the position taken by the demurrants in this specification of demurrer.

The Secretary of the Interior, in his decision of November 25, 1892 (R., p. 46), holds that the legal representatives of Hackley are not entitled to the land in controversy upon the ground that the occupation of the land, at the time of the passage of the act of 1826, by a detachment of United States troops in camp,

brought this tract within the exception contained in the act as land "rightfully claimed by any other person."

The learned judge of the court below bases his opinion (R., pp. 88 and 89) upon the same ground, holding that this occupation, being a rightful claim by some other "person," excepted this tract from "the right of pre-emption which would *otherwise have attached.*" (Italics ours.)

In the view of the Honorable Secretary of the Interior and of the judge of the court below, therefore, the decision of the whole case rests upon the issue raised by this specification of demurrer.

Realizing that the act of 1826 made no exceptions of land occupied, or even formally reserved by the United States (except by act of Congress.—Act 1813), the Department of the Interior and the court below, while speaking of this temporary occupation as a reservation (which term we will show is entirely inaccurate), have based their decisions, not on the fact that the land was reserved, for such a conclusion would be utterly without foundation in fact or in law, but upon the fact that such occupation constituted a "rightful claim of some other person."

In view of the fact, however, that they have used the word "reservation" with respect to this occupation by a detachment of United States troops, and in view of the importance which they have attached in their decisions to this point, we propose to meet fairly every possible question that can be raised by the specification of demurrer or by the decisions of the Secretary of the Interior or the court below, holding against the Hackley heirs upon this issue.

Insisting always that our clients come within the terms and intent of the act of 1826, and must be given its benefits, we will consider the questions raised by this demurrer and the opinions referred to under the following heads:

(1) The facts with reference to the possession and occupancy of this tract of land by the detachment of the troops of the United States;

(2) Whether or not this occupancy or possession constituted a "rightful claim by any other person";

(3) Whether the occupancy of this tract of land by a detach-

ment of troops prior to 1830 constituted a reservation of the land so occupied within the contemplation of the law or changed its legal status with respect to the act of 1826; and

(4) The real effect of the possession and occupancy of this land by the troops of the United States prior to 1830.

1. The Facts with Reference to the Possession or Occupancy of this Tract of Land by the Troops of the United States.

It is alleged in the bill (R., p. 5) that Hackley settled upon, inhabited and cultivated the tract of land in question in 1823, and continued in possession thereof until 1824, when a detachment of United States troops under the command of Col. George M. Brooke, in connection with Indian troubles then existing, took possession of said tract of land and established a camp, or cantonment, thereon; that said troops continued to occupy this camp until December 10, 1830, when, by executive order of the President of the United States, a military reservation was declared, embracing a large tract of land in this territory, the tract in question being a part thereof.

These allegations are admitted by demurrer and fully sustained by affidavits and other exhibits filed with the bill (R., p. 21, *et seq.*). It further appears from the record that this tract of land remained in reservation until 1883, when by formal order it was restored to the public domain.

During the period when said land was in reservation, Hackley and his legal representatives continued to assert their right thereto whenever the same should be released from government occupation. Subsequent to the restoration thereof to the public domain in 1883, the defendants and others initiated claims and attempted to secure the land under the pre-emption and homestead acts, and thereupon a controversy arose between these claimants making claims initiated after the restoration of the land to public domain in 1883, and the legal representatives of Hackley, basing their claim upon his settlement in 1823–'24, and the rights conferred by the act of 1826.

We ask the court to bear especially in mind the following points in the brief summary of facts above given, all of which are sup-

ported by the finding of the Secretary of the Interior, made a part of the record:

(1) The land in question was inhabited and cultivated by Hackley in 1823–'4;

(2) From 1824 to December 10, 1830, this tract of land was occupied by a detachment of troops in a temporary camp or cantonment.

(3) That this tract of land was actually reserved by executive order *for the first time on December* 10, 1830, more than four years after the passage of the act of 1826 (R., p. 51).

Secretary Noble, in his opinion (R., p. 36), holds that the settlement of Hackley was excepted from the provisions of the act of 1826, "being rightfully claimed as a reservation" at the date of the passage of the act.

Secretary Smith, in his opinion (R., p. 54), says: "The tract known as Fort Brooke Military Reservation was occupied under the direction of the Secretary of War two years before the passage of the act on which the claim of the Hackley heirs is predicated."

The court below, in its opinion (R., p. 89), says:

> "The Secretary of the Interior finds, as a matter of fact, that this land, known as Fort Brooke Military Reservation, was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated, and this court is bound by such finding of fact."

In view of the ambiguous language contained in the statements of the Secretaries of the Interior above noted, and of the importance given thereto by the court below, it becomes necessary to examine critically the facts with respect to the occupation of this land by the troops of the United States, to ascertain, first, what was the true meaning and intent of the language used by the respective Secretaries of the Interior; and, second, to what extent it constitutes a finding of fact, and to what extent it is a mere conclusion of law which may be reviewed by the court.

It appears from the record, and is an historical fact of which the court will take notice, that the movement of these troops to Southern Florida was for the purpose of protecting and aiding Col. James Gadsden in running a line in accordance with a recent

Indian treaty, by which treaty the Indians were to be removed to a point south of the line so to be run. This will be clearly seen by reference to the orders and other papers among the public records of the War Department (made a part of the record in this case in the Interior Department), which, in so far as they are applicable to the point under consideration, are as follows:

"ADJUTANT-GENERAL'S OFFICE,
"WASHINGTON, 5 *Nov.*, 1823.

"Order 70.

"Brevet Col. Brooke, with four companies of the Fourth Infantry, will proceed with as *little delay as practicable* to Tampa Bay, East Florida, where he will establish a military post. He will select a position with a view to the health and in reference to the Florida Indians about to be removed to that vicinity agreeable to the late treaty. Upon this point he will consult Col. Gadsden, the commissioner employed in locating the Indians. * * *

"*The permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch,* and, should Col. Clinch have rejoined his regiment, on the receipt of this order he will be charged with the duty of preparing Col. Brooke's command *for the expedition to Tampa.*

"By order of Major-Gen. Brown.

"E. KIRBY, *Aid-de-Camp.*"

"ST. AUGUSTINE, 1 *December*, 1823.

"DEAR COL. (BROOKE): I have this day received a copy of an order from the Adj. Genl's Office stating that four companies of infantry under your command had been *detailed* to occupy a post at the Bay of Tampa, and that you were instructed to consult with me as to the proper site. * * * *As I shall expect some facilities from your command towards the discharge of the duties as Indian commissioner assigned me,* I have to request that you will endeavor to make as *early movement as practicable,* so as to meet me about the time contemplated, *otherwise I may be much embarrassed in my operations, if not much exposed to privations of a severe character. I feel the more anxious on this subject as the Indians south have of late exhibited something like an unfriendly feeling, and are unwilling that I should run the line. Immediately your presence with troops will produce the most happy effect, and to your exer-*

tions I may acknowledge myself indebted for the faithful and efficacious discharge of the most arduous service I have undertaken.

"Your obedient servant,

"JAMES GADSDEN."

"CANTONMENT CLINCH, 3 *December*, 1823.

"*To Adj. Genl., Washington, D. C.:*

"SIR: I had the honor last mail to receive Orders No. 70. * * * I am well informed that in the neighborhood of Tampa Bay there is little timber, and none of it fit for building. * * * I have required of the Quartermaster Dept. at New Orleans the necessary number of tents, and as soon as they arrive I shall be more positive as it regards the time of my departure.

"Very respectfully, GEO. M. BROOKE,

"*Col., U. S. A., Commanding 4th Infantry.*"

"CAMP ON HILLSBORO RIVER, *Feb. 3d*, 1824.

"*To Maj.-Genl. Brown,*

"*Commander-in-Chief:*

"SIR: I have the honor to report that I left Pensacola with four full companies on 15 January last. * * * On the 22d met with Col. Gadsden, who had arrived some days previous, and who had made a partial reconnoissance of the country, but had not selected any particular spot. *On visiting several places, and after a consultation,* we determined on this place as the most eligible regarding the *object of the expedition.* * * *

"Immediately in the rear of this place, say two miles, the ridge of piney lands commence, in which I saw some very fine springs, and should the slightest disease manifest itself, we will *retire on it with our tents.* * * * I have not as yet seen many Indians, but expect to have a talk in a few days, as I have sent to the chiefs. Those whom I have seen do not appear to be well pleased with the treaty, and have expressed some dislike to Col. Gadsden's *running the line. They will be treated with kindness and respect, but at the same time with determination and firmness.* It would have a good effect on the Indians if some of our vessels of war were ordered to look into this bay frequently from Key West, from which we are but a short distance. The Indians appear to have no idea of the strength and power of the United

States. Col. G. left us two days since, himself and party in good health. Upon his request *I furnished him with three additional men.* The number of tents I should wish forwarded will be fourteen wall, two hospital, and forty common. By every opportunity I shall furnish such information as I may acquire of the country and its resources, with such other matters as may be interesting to the Department of War.

"I have the honor to be, with gr.

"Your very obedient servant,

"GEO. M. BROOKE,

"*Col., U. S. A., Commanding.*

"To Major-General JACOB BROWN,

"*Commander-in-Chief.*"

The nature of this movement and the temporary character of the occupation of this tract of land prior to the reservation in 1830, is obvious from a mere examination of the language of these orders and reports, and of the facts and circumstances existing at the time.

It will be noticed that the order for the movement of this detachment of troops was not an order of the Secretary of War, but emanated from the office of the *Adjutant-General* in the ordinary conduct of the military business of the government, and was signed by an *aid-de-camp.*

It does not direct the officer in charge of these troops to take possession of any *specific tract of land,* but simply to establish himself at some point to be agreed upon between him and Col. Gadsden, with a view to health and in reference to the Florida Indians about to be removed.

The order further specifies that the *"permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch";* thus clearly indicating that it was contemplated that the establishment of this camp would be temporary.

A letter from Col. Gadsden to Col. Brooke bears out this conclusion, and Col. Brooke's report to the War Department, after stating that he visited several places and selected the camp from which he was writing, indicates that he may *retire therefrom* to some other point, in event of disease manifesting itself; the troops being quartered in tents.

It is a further historical fact, shown by the public records of the government at the time, that the removal of these Indians was attended with difficulty, and resulted in outbreaks which continued from time to time until the final termination of the Seminole wars, and the removal of this tribe to the western territory.

As a result of these conditions it was necessary for this and other camps to be continued far beyond the time contemplated by the parties, and the troops, as appears from the record, remained at this point still in cantonment or temporary camp until 1830, when, as was found by the Secretary, an executive order was issued establishing a large reservation, which embraced the point in question.

In the light of these facts, let us notice the language of the Secretaries of the Interior quoted above, and referred to by the court below in its opinion.

If Secretary Noble means by the expression that this land was rightfully claimed as a reservation in 1826, to state that it was in such reservation as to affect its legal status and to sever it from the public lands, his statement is in direct conflict with his own finding at page 36, where he states that "on December 10, 1830, said site was formally reserved by executive order, in which its limits were fixed at sixteen square miles." Until December 10, 1830, there was not the slightest suggestion of reservation of this land among the records of the government, nor of any other action with respect thereto which would affect its status as public land.

If the Secretary means that the occupation by the troops of the United States constituted a reservation, this is not a finding of fact, but a mere conclusion of law, construing the legal effect of the fact of occupation. This conclusion of law is in no sense binding upon the court, and, as we will show hereafter, is absolutely without support in reason or in authority.

Lee v. *Johnson*, 116 U. S., 48.

Secretary Smith, in the language above quoted and relied on by the court below, does not find that there was any reservation of this land prior to 1830, but says that the same was *"occupied"* by the troops of the United States two years before the passage of the act, which statement is literally correct. He then holds, how-

ever, that this "occupation" brought the land within the exception of land "rightfully claimed by any other person" contained in the act of 1826. In this conclusion of law the court below agreed with him, and upon this point alone sustained the demurrers to the bill. It is for this court to say what, if any, was the real effect of this occupation.

It will thus be seen that the record in this case clearly shows that there was no reservation of this land until December 10, 1830, more than four years after the passage of the act of 1826, and such is the finding of the Secretaries of the Interior in their respective opinions; that if the legal status of the land as public land were changed in any way prior to the 10th of December, 1830, it resulted solely from the occupation thereof by a detachment of troops in temporary camp or cantonment. The legal effect of such occupation, if any, is purely a question of law, as to which the courts are in no way bound by the finding of the Interior Department.

Lee v. *Johnson,* 116 U. S., 48
Johnson v. *Towsley,* 13 Wall, 72.

Let us now consider whether such occupation brought this tract of land within the exception contained in the act of land "rightfully claimed by any other person."

2. Did the Occupation or Possession of the Tract of Land in Question at the Date of the Passage of the Act of April 22, 1826, Bring this Tract of Land within the Exception Contained in the Act, of Land Rightfully Claimed by any other Person?

The Act of 1826 gives the right of pre-emption to any tract of land in the territory of Florida, "which tract is not rightfully claimed by any other person" at the date of the passage of the Act.

We will undertake to show:

(1) That the temporary occupation of this tract of land by the troops of the United States in 1826, did not constitute a *claim* to the land at all; and

(2) That even if it had been claimed, it would not have been within the terms of the Act, since it was not a claim by "any other person."

1. *The possession of this tract of land by a detachment of troops in temporary camp did not constitute a claim to the land within the meaning of the Act of* 1826.

Under this head, we submit the following propositions:

(*a*) That there was never in fact any *claim* to the land by Col. Brooke in his personal capacity, or by any one in his command. Indeed, it is a fact admitted by all parties that no claim to this land was ever made by any person other than Robert J. Hackley, or his legal representatives, until subsequent to 1883, when the claims of the appellees were initiated;

(*b*) That the temporary occupation by a detachment of troops having their permanent headquarters at Cantonment Clinch, did not, and could not, constitute a claim to the land by Col. Brooke as an agent or officer of the Government, on its behalf.

The record shows conclusively that Col. Brooke never thought of making any claim to the land in question as an officer of the United States. He gave an affidavit of Hackley's settlement and cultivation to enable Hackley to perfect his claim. During his occupation of the land by the troops of the United States, he simply took possession of the same so long as required for the purpose of his expedition. He had authority to do this, and no more. His claim, if any, was limited to the right of *possession*, as distinguished from the *title* to the thing itself.

Even if Col. Brooke had undertaken to lay a claim on behalf of the United States to the land in question, so as to segregate the same from the other public lands, he could not have done so under the law.

This subordinate officer, in charge of a small detachment of troops, was an agent of the government, with limited and well defined authority. That authority extended only to the movement of the troops under his command, under orders from his superior officers. It had no relation to the public lands, and he was given no jurisdiction over the same, further than a possession of such parts thereof so long as such possession was necessary to the conduct of the military operations in progress. It has been held in numerous cases that in order to create a reservation of public lands, so as to segregate the same from other adjoining lands, or to exempt it from the operation of an act of

Congress, it must be reserved by competent authority, and with such order of reservation there must be accurate description of the land reserved, by metes and bounds; that such reservation must be made with such solemnity and publicity as will forever set apart the lands so reserved, so that they cannot be disposed of other than by act of Congress.

Wolsey v. *Chapman,* 101 U. S., 755.
United States v. *Tichnor,* 12 Fed. Rep., 421.

The Constitution gives to Congress the sole and exclusive power to dispose of, and to make regulations respecting the public lands. The courts have held that the President of the United States has the power, as commander-in-chief of the army, by executive order, to reserve public lands from sale where the same are necessary for military purposes, and this doctrine has been carried to the extent of holding that an order issued by the Secretary of War is construed to be an order of the President himself for this purpose, and where such order is made with the formalities and description of the land required by law, it will be effective to create a reservation.

The most liberal interpretation of this doctrine, however, has never carried it to the extent of holding that an order of a subordinate officer of the government, even if made for the purpose of affecting public lands, is effective so to do, because the presumption which holds in the case of the Secretary of War, that he is acting as the mouthpiece of the President, does not apply in the case of orders issued by subordinate officers.

See *Wilcox* v. *Jackson,* 13 Wall., 498.
United States v. *Stone,* 2 Wall., 537.
Missouri, &c., Ry. Co. v. *Roberts,* 152 U. S., 119.
Morrow v. *Whitney,* 95 U. S., 551.
Wilcox v. *McConnell,* 13 Pet., 498.

The distinction between mere "occupation" and reservation of public lands is clearly drawn in *Morrow* v. *Whitney, supra.* There the statute under construction excepted lands "occupied by the United States for military purposes." The court held that occupation was a fact to be shown by parol evidence, while reser-

vation was a matter of record to be shown by copy of the President's order.

If, therefore, it be contended that Col. Brooke, by taking possession of this land as a temporary camp or cantonment, was in fact *claiming* the same on behalf of the United States, such contention would be met by the *fact* that there is nothing in the record to show any such claim on the part of Col. Brooke or the government; and by the *proposition of law* that even if he had undertaken to make such a claim, he would not have been vested with authority so to do for the reasons:

(1) That it was not within the scope of his authority, as a subordinate military officer of the government, to make claim to public lands of the United States so as to affect in any way their legal status.

(2) That a reservation of public lands or any act setting apart the same, or segregating the land from the general body of the public lands, is an exercise of discretion which by the Constitution is vested in Congress, and by construction has been held to have been vested in the President of the United States—a discretion and judgment, however, which cannot be delegated to a subordinate officer, even if it is sought so to do.

> "If discretion and judgment are to be exercised either as to time, ownership or feasibility of the exercise of an official function, the body or officer charged with the duty to decide must exercise it, and can not delegate it to any other officer or person." (Am. & Eng. Ency. Law (1 ed.) Vol. 19, 441.)

It has been held, by the Supreme Court of the United States, that mere occupation of a tract of public land by an officer of the government in the performance of his official duties, is not an occupation by the United States, and is no bar to the initiation of a pre-emption claim.

Thus, in the case of the *United States* v. *Fitzgerald,* 15 Peters, 407, an official of the Treasury Department connected with the revenue service, occupied a strip of land in the delta of the Mississippi, which had been occupied by a boarding officer in that jurisdiction for many years. During such occupation he made claim in his personal capacity to the right of pre-emption in the

purchase of the land under the act of May 29, 1830, which right was recognized and a patent granted. The United States brought suit to recover the land upon the ground that it was not subject to the right of pre-emption, since it was occupied by him as an officer of the government at the very time that he initiated his right, and that this occupation being, as it was claimed, the occupation of the government, prevented the right of pre-emption from attaching. The effect of such occupation by him as an officer of the government upon the right of pre-emption to the land was squarely raised by counsel for the government, at pages 414, 415 of the report, in the following language:

> "Now the evidence in this case shows that the settlement of Fitzgerald bears no resemblance whatever to such occupation (*bona fide*). Even if he cultivated this remote, inhospitable strip of land jutting into the ocean, it was done with no such intention on his part. He went there from necessity as a public officer for a public purpose. He was sent there. Can a public officer sent for a public object, on a part of the public domain, be construed as a settler? Could a body of troops stationed through the winter on public land near the frontiers acquire the pre-emption rights of settlers? Fitzgerald admits that he went to this place as a boarding officer; that he took possession as such; that he occupied the cabin as such; the Collector proves that in such capacity he allowed such occupation. If this gives a pre-emption right, there is no occupation of the public soil for public purposes by an officer sent upon it, that will not give it."

The Court in passing upon this contention says:

> "No authority is known to exist in any collector under the law to make an appropriation of land for use of the United States."

In the Fitzgerald case the facts were much stronger against the pre-emption claimant than in the case at bar. There the land had been occupied for a long time for government purposes, and was in actual occupation for such purposes at the time of the *initiation* of the pre-emption claim. It was a claim against the *government,* in which the claimant is always at a disadvantage.

In this case, on the contrary, Hackley's claim was initiated long before there was any possession by troops. He makes no claim

against the government, but it is a contest between private individuals where the priority of his claim is admitted. In this case the occupation at the time of the passage of the act was only temporary in its character, and it was obviously contemplated that it was to be temporary in fact. The fact that subsequent events made it necessary to prolong this occupation affected in no way the right of Hackley, which had already attached, further than to suspend the enjoyment of that right until the occupation of the government terminated.

It is respectfully submitted, therefore:

(1) That the occupation of this tract of land by Col Brooke, in temporary encampment, was not in fact, and was not intended to be, a *claim to the land* on behalf of the government of the United States.

(2) That even if it had been so intended, the occupation under the facts as disclosed by the record, a subordinate military officer of the government, exercising his own discretion as to the selection, for the temporary purposes of a military encampment, could not as a matter of law have constituted a claim to the land itself, and could not have affected the legal status of the same, or severed it from the general domain, or exempt it from the operation of an act of Congress.

That this mere temporary occupation by a detachment of troops in camp was not a claim to the land itself within the meaning of the act of 1826, becomes more apparent, if possible, from a consideration of the conditions existing at the time, which Congress must have had in view.

The Territory of Florida was ceded to the United States by the government of Spain in 1819. At the time of this cession there were numerous claimants to portions of the public land in the territory, under grants from the Spanish government made prior to the cession, some of which were valid and others not, and between the time of such cession to the passage of the act of 1826, such claimants had sold portions of the land claimed by them to other settlers in the territory.

The reports of the United States Supreme Court are full of cases arising under these Spanish grants. The government appointed a commission to consider and pass upon such cases and

difficulties arising from these grants, and claims thereunder were at the time of the passage of the act of 1826 demanding the constant consideration of the executive, legislative, and judicial departments of the government.

Under such conditions, if Congress had made a grant of the right of pre-emption in the purchase of land to any settler who had inhabited and cultivated the same prior to 1825, without exception, it would have given rise to numerous contests between claimants under Spanish grants and other similar claims, and persons claiming under the pre-emption act.

To avoid these conditions and any conflict of interests of the pre-emption claimants with prior and superior rights of other persons, Congress embodied in the act the provision that it should not apply to lands "rightfully claimed by any other person." This language was plain in itself. When taken in connection with the existing circumstances at the time of the passage of the act, it can have but one meaning and one application, and that is, that it referred and was intended to refer only to private land claims in the Territory of Florida.

Another historical fact which is abundantly shown by the record and the history of that period, is that at the time of the passage of this act, owing to Indian troubles existing, there were encampments of troops on the public lands throughout Florida.

It may be asked, therefore, if Congress desired to except from the operation of the act of 1826 lands so occupied by the troops of the United States, who might be removed the next day without affecting the legal status of the land, why did it not specifically make such exception? Is it conceivable that in passing a general act of this kind, if Congress desired to except such lands it would have done so in the narrow and ambiguous language of lands "rightfully claimed by any other person"?

Before and after the act of 1826 it was often the custom in such acts to make exceptions of lands "occupied" or "reserved" for military or other purposes. (See act of June 13, 1812, 3 Stats., 748; act of February 21, 1823, 3 Stats., 724, and act of May 29, 1830, 4 Stats., 420.)

The act of February 23, 1823, expressly excepted lands *occupied* for military purposes. In *Morrow* v. *Whitney*, 95 U. S.,

551, this act is considered, and the difference between "occupation" and reservation is pointed out.

The act of 1813, incorporated into the act of 1826, excepted lands "reserved from sale by *former acts,* or lands which have been directed to be sold in town lots and out-lots." While making such exceptions, can it be conceived that if Congress intended to except lands then "occupied" as military camps, it would not have done so, as in the act of June 21, 1823, only three years before (*Morrow* v. *Whitney, supra*)? To ask the question is to answer it. It is little less than absurd to contend that Congress, with title to nearly all of the land in Florida, and full power to make reservations and exceptions, would have rested a *claim* upon a mere temporary occupation of a few companies of troops, which might have been ended next day by a subordinate military officer. We respectfully submit, therefore, that neither in fact nor in law did this temporary occupation of the tract of land in controversy by Col. Brooke and his detachment of troops constitute a *"claim"* to the *land itself,* either on the part of Col. Brooke or on behalf of the government of the United States.

The words "rightfully claimed" as used in the act could have no other meaning than a claim of title, as the United States already had title to all lands made subject to pre-emption by the act, if these words applied to the title of the United States or to a person claiming for the United States, it would have eliminated all lands from the operation of the act, and rendered the same a nullity. Such a construction would be opposed to principle and authority.

2. *Even if such occupation had been a claim to the land, it would not have been within the terms of the exception contained in the act, since it was not a claim of "any other person."*

We have seen that neither Col. Brooke nor any other person except Robert J. Hackley ever made claim to this tract of land until after 1883.

We insist, however, that even if the mere occupation or possession of this tract of land in 1826 by a temporary camp of troops could be contorted in fact or in law into a "claim to the land," yet such claim could not come within the terms of the exception contained in the act, as the word "person" cannot be construed to embrace the United States Government.

This point was directly decided by the Supreme Court of the United States in the case of *United States* v. *Fox*, 94 U. S., 321.

In that case a devise of land had been made by a resident of the State of New York to the government of the United States. The statute of New York provided that a devise of land might be made to any person capable by law of holding real estate. The question for consideration was whether or not under such a statute a devise to the government of the United States was valid, or whether the government was a "person" within the meaning of the act. The Supreme Court of New York held the devise invalid, upon the ground that the word "person" could not be construed to mean the government. The Supreme Court of the United States on appeal held as follows:

> "The statute (of New York) provides that a devise of land may be made to any *person* capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.
>
> "The term 'person' as here used applies to natural persons and also to artificial persons, bodies politic deriving their existence and powers from legislation, but cannot be so extended as to include within its meaning the general government. It would require an expressed definition to that effect to give it a sense thus extended."

See also *U. S.* v. *Perkins*, 163 U. S., 630.

In the case of *The Alabama Certificates*, 12 Opinions of the Attorney-General, 176, the Hon. Henry Stanberry, Attorney-General of the United States, was called upon to decide whether or not the term "person," as used in the revenue act of July 13, 1866, embraced a State. The act in question levied a tax of 10 per cent. upon the notes of "any person, State bank or State banking association, used for circulation," etc. By the forty-fourth section of the act it was provided that "any word or words in any or all parts of this act, and of all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever when not otherwise designated, or manifestly incompatible with the intent thereof."

The obvious intent of this act was to prevent the circulation as currency of notes or paper issued from any other source than national banks or the government of the United States, and by well recognized rules it was of course to be construed to accomplish this purpose. The language defining the word "person" quoted above was, it seems, as broad as it could be made.

The State of Alabama issued certificates for circulation, and the question was whether or not they were subject to taxation. If the language of the act and the broad definition thereof could be construed to embrace a statute, they were subject to taxation; otherwise not.

At page 180 the Attorney-General says:

> "We come, then, to the very point. Is the term 'person,' as used in the ninth section, and as explained in the forty-fourth section, to be held to include a State? After the most careful consideration, I must answer this question in the negative. A State is in one sense a body politic and corporate. In the largest meaning of the word 'corporation' a State is a corporation, and the United States is a corporation, and they are both bodies politic as well as corporations, but a private corporation is a body politic and corporate, and is so described in our elementary books."

After discussing the subject at some length he says:

> "And if it was intended to include a State, why not say a State, without any circumlocution? If it was intended to include a city, why not name it? But here a State or city is not named, nor is the usual term of description, to-wit, a public corporation, used to embrace them."

So in the case now under consideration, if Congress *intended* to exempt from the operation of this act lands in the temporary *occupation* and use of troops of the United States engaged in military service, why not say so?

In his opinion on *Tax of State Railroads and Manufacturers,* 12 Op. Atty.-Gen., 277, the same Attorney-General renders an opinion upon the act of June 30, 1864, levying a tax upon every person, firm, company or corporation owning or possessing, or having the care or management of any railroad," etc., and there is incorporated in this act the same broad definition of the term

person or corporation as is contained in the act of July 13, 1866, above referred to. The question was whether a State owning or managing a railroad was subject to taxation under the terms of this act. After reviewing the language and calling attention to the fact that Congress could have used the term "State" if it had intended that a State should be embraced within the meaning of the act, the Attorney-General says:

> "Standing, then, upon the language used in these sections alone, I am of the opinion that they do not authorize a tax upon the gross receipts of a railroad owned by a State, or upon interest payable upon its bonds, if it have any outstanding, or upon its accumulated profits."

So in this case, standing upon the language of the act, we earnestly insist that a mere occupation of this tract of land by a detachment of troops of the United States cannot bring the land within the exception of a tract rightfully claimed by any other *person*.

It is respectfully submitted, therefore—

(1) That no claim to the land in question was ever made by the government or any one else, based upon the occupation thereof in 1826.

(2) That such occupation could not bring the tract of land within the exception named in the act, because—

(*a*) It was not sufficient in *fact* or in *law* to constitute a *claim* to the land.

(*b*) It could not by any reasonable construction be said to be a "claim of any other *person*."

(3) That the exception was simply intended to protect valid private land claims, and should be so construed.

3. Did the Occupation of this Tract of Land by a Detachment of Troops, in Camp from 1824 to 1830, Constitute a Reservation of the Land or Change its Legal Status with Respect to the Act of 1826?

The Constitution of the United States, Article IV., section 3, vests in Congress "power to dispose of and make all needful rules and regulations respecting the territory" of the United States.

The power to dispose of the public lands carries with it the power to reserve the same from the operation of a general act mak-

ing such disposition, and authority need hardly be cited to show that where Congress, having special control of the public lands, passes such general acts without making exceptions, such acts will operate upon all the lands in the said territory.

Donaldson, in his History of the Public Domain, p. 249, states the method of creating a military reservation from the public lands, as follows:

> "The commanding officer of a military department recommends the establishment of a reservation with certain boundaries. The Secretary of War refers the papers to the Interior Department, to know whether or not any objection exists to the declaration of the reserve by the President. If no objection is known to the General Land Office, and it is so reported, the reservation is declared by the President upon application of the Secretary of War for that purpose, and the papers are sent to the General Land Office through the Secretary of the Interior for annotation upon the proper records."

It thus appears that such reservations can only be lawfully made by Congress, by the President, or by some head of department acting for the President, such as the Secretary of War or the Secretary of the Interior.

As we have already seen, even an order of the President must designate the land to be reserved by metes and bounds, and comply with other formalities to segregate the same from the public domain, or remove it from the operation of a general act of Congress.

Walsey v. *Chapman,* 101 U. S., 755.
Morrow v. *Whitney,* 95 U. S., 551.
Missouri, etc., Ry. Co. v. *Roberts,* 152 U. S., 119.
U. S. v. *Tichnor,* 12 Fed. Rep., 421.

The order under which this land was occupied *contained no reference* to public lands. It was not issued by the President or any one authorized to speak for him, but by a military officer through an *aide-de-camp.*

No authority can be found to sustain the suggestion that any subordinate officer can make a reservation of public lands so as to

remove the same from the operation of an act of Congress. There are, however, authorities directly to the contrary.

In the case of *United States* v. *Tichenor,* 8 Sawyer, 142; 12 Fed. Rep., 415, this question was elaborately discussed. That case involved a claim under the Oregon Donation act of September 27, 1850 (9 Stats., 497), which act gave to every person "who is a citizen of the United States, now residing in said territory, or who shall become a citizen thereof on or before the 1st day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man," etc. The act also provided "that such portions of the public lands as may be designed under the authority of the President of the United States for forts, magazines, arsenals, dock-yards, and other needful public uses, *shall be reserved and excepted from the operation of this act.*" (Italics ours.)

In July, 1851, William Tichenor settled on a tract of land under said act, and laid off a town thereon, called Port Orford.

In September, 1851, Lieutenant Wyman, United States army, erected some buildings upon a portion of the town site, for use of troops when stationed at that point.

On October 16, 1851, General Hitchcock, United States army, in command of the district, "ordered that a military reservation be established there, and that a tract of land be selected and set apart and reserved for that purpose;" and soon after Wyman "caused a tract of land to be marked out for and as a military reserve, including the buildings aforesaid, which also included a *portion of the tract settled upon by Tichenor.*"

On March 17, 1852, the said "military reservation was duly published."

On September 29, 1856, Tichenor made proof of his four years' residence and cultivation, as required by the Donation act, including in the land claimed so much of the reservation as fell within the lines of his original tract. On February 5, 1866, a patent was issued for the whole donation, *including this portion of the reservation.* In 1880 the government brought suit to cancel the patent as to the portion of the reservation included therein.

It will be seen that this act expressly excepted from its operations lands reserved for military and other purposes named, and that the settler acquired no perfect right until he had completed his four years' settlement and made proof of the same; that within a few months after the initiation of the settlement an officer of the United States army erected buildings thereon for the use of troops, and the reservation thereof was declared by a general of the United States army commanding in the district.

The act of 1826 contained no exception as to military reservations, and it is admitted that no defined boundaries of Cantonment Brooke were given, and no proclamation of a reservation, and no record of such a reservation made until 1830. The Tichenor case, therefore, is much stronger in favor of the reservation than the Hackley case. Notwithstanding these facts, the court held, without hesitation, that there was no authoritative reservation of the land in controversy which would defeat the settlement right of Tichenor to his entire tract, including that which the general of the United States army *had attempted to reserve,* and upon which buildings were erected within two months after the initiation of the settlement.

At page 151 the court says:

> "The power to dispose of the public lands is granted to Congress. No appropriation of them can be made for any purpose but by authority of Congress. (*United States* v. *Fitzgerald,* 15 Pet., 421.) By the Donation act Congress disposed of all the public lands in Oregon to persons who should become settlers thereon, and otherwise comply with the provisions of that act, except mineral lands, lands reserved for salines, and such portions thereof as might be designated by authority of the President for forts, etc.
>
> "The reservation must be designated, marked out, and appropriated to the permitted public use by the President, or under his directions. What constitutes such a designation may be a question. *At least, the reservation ought to be described or indicated with reasonable certainty as to limits and quantity, in some public document on record, and probably it ought to be noted on maps of the public surveys.* (*Wilcox* v. *Jackson,* 13 Pet., 512; *United States* v. *Fitzgerald,* 15 Pet., 419.)
>
> "But it does not appear from the public surveys that a reservation at Port Orford has ever been entered thereon

for any purpose. Neither is there any allegation in the bill that the reservation was ever designated or marked on the map or any survey; and, what is more, that it was designated or authorized at all *by the President.*

"It may be admitted, as suggested in *Wilcox* v. *Jackson,* 13 Pet., 513, that if the order directing the reservation to be made had been issued by the Secretary of War—the head of the department through whom the President would speak and act upon the subject—in the absence of evidence to the contrary, it would be presumed that he acted by direction of the President.

"But *neither General Hitchcock or Lieutenant Wyman had any authority to designate or establish a reserve at Port Orford for any purpose.* It is not alleged that they were acting in the premises under authority of the President, and there is no presumption of law that they were.

"It may also be admitted that General Hitchcock could direct his subalterns engaged in military operations in Oregon to establish and *equip a camp or fort on the public lands thereunder;* or that the latter might do so under the circumstances *without any direction from the former; but such use or occupation would not have the effect to import any special character to the land, or constitute it a reservation for any purpose within the purview of the Donation Act.* It would still remain open to the claim of any qualified settler under the act, and as soon at least as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler." (Italics ours.)

The language quoted is directly applicable to the Hackley case. By the pre-emption act of April 22, 1826, Congress "disposed of all the public lands" in Florida to persons who had settled thereon prior to January 1, 1825, which lands were not rightfully claimed by any other person. In order to constitute such a reservation as would remove the lands from the operation of this act, if any reservation would have done so, it must have been designated and indicated with reasonable certainty upon the public records by order of the President or Congress. No such designation was ever made until 1830, after Hackley's right had vested, and there is nothing on the public records with reference to this land until that date. Neither the President nor the Secretary of War directed Col. Brooke to take possession of this *particular tract of land,* and there is nothing in his orders with refer-

ence to the same. Reservation after the act of 1826 could not affect his rights (*U. S.* v. *Fitzgerald,* 15 Peters, 419).

As stated by the court, with reference to General Hitchcock, even if he had attempted to make such reservation, it would not have given to the land so selected any special character, nor would it have interfered with the pre-emption rights of a former settler thereon, further than to suspend his *occupancy* until the camp or post was removed. It would seem that the Tichenor case is conclusive of this case upon the question of reservation.

The case of *Johnson* v. *United States,* 2 Court of Claims Reports, 391, also involved a claim under the Oregon Donation act. The court in that case, however, bases its decision upon authorities construing the early pre-emption acts, and in speaking of the analogy between these acts, and after stating that an effort had been made to distinguish between them, says:

> "In the first place the payment of money was only a part of the consideration given by the grantee under the pre-emption acts. There, as here, he was required to occupy and cultivate. There the grant was restricted to even a smaller tract than was here given, and the policy and chief end of the statute as to this was to foster the advance of civilization into the uninhabited and useless portion of the national domain. The Donation Act was only an advance on the same line of national policy, and the patent which it promised was not a naked gift, but a grant upon a present consideration received and accepted by the grantor. This consideration was just as valid and binding upon the government as the other, for in the eye of the law services are as sufficient a consideration to support a grant as money or services and money."

It will be thus seen that the court places the two classes of acts upon exactly the same basis, and the Johnson case is, therefore, directly applicable to the case at bar.

In July, 1850, Johnson settled at the head of ocean navigation, on the Columbia River. He continued to reside on the land until 1856. In that year, before he had made proof of his settlement, when, as the court states, "his title rested entirely upon his four years' continuous residence and cultivation, and previous notification," he was ejected from his settlement by a detachment of United States troops, who established a military

post thereon and erected buildings for the accommodation of the troops. The following facts as to this occupation are taken from the opinion, page 413:

> "The story of its occupation is briefly detailed by General Wright, commanding the Department of the Pacific, and is as follows: 'In the spring of 1856, when I was in command of the United States troops operating against hostile Indians in Oregon and Washington Territories, *I found it necessary,* to preserve my line of communication, to establish a post on the Columbia River, at the foot of the Cascades. A small reservation was laid off and block-house erected. The post thus established and known as Fort Cascades was occupied until 1861, when the troops were temporarily withdrawn, and the building and grounds placed under charge of an agent of the Quartermaster's Department.' "

It further appears from the opinion that the property remained in the possession of the United States until the bringing of the suit, and that subsequent to the institution of the suit the Secretary of War issued an order formally reserving the same as a military reservation.

Upon the facts above stated the court held that Johnson was entitled to his land, and that there had never been any military reservation of the same. At page 413 the court says:

> "But in addition to the legal conclusion which we here reach, we are of opinion, as a matter of fact, *that no military reservation was ever made or intended to be made by the government.* . . . Up to the time of the commencement of this action there is nothing to show that the subject of this reservation ever received a thought from the *President* or from any officer *authorized to speak for him.* There are indeed certain documents printed in the record, consisting of communications and reports from the officers in the War Department, which may indicate, if not establish a *recent* determination of the Secretary of War to retain the post at the foot of the Cascades and make it permanent; but this determination, if it exists, and all of the communications which indicate it, are *subsequent* to the bringing of this action." (Italics ours.)

In this case the post was marked off, and established at the time the troops took possession and buildings erected thereon;

while in the Hackley case the communications from Col. Brooke indicate that there were no boundaries fixed for the camp; that his occupancy was intended to be only temporary; that he anticipated he might remove to another section, and the occupancy of the troops prior to 1830, so far as the record shows, was in tents, and but a temporary encampment, with no idea of a reserve until the continued troubles made it necessary to establish a permanent post, which was done by the order of December 10, 1830, establishing the reservation, four years after Hackley's rights had vested.

We desire to call attention in this connection to only one more case, as we regard the above cases as conclusive.

In the Camp Stambaugh case, however, the Attorney-General, the Secretary of War and the Secretary of the Interior, all united in supporting our contention that a reservation of the public lands can only be made by Congress, or the President, or some one acting in the name of the President.

In the early part of the year 1870 numerous citizens of Sweetwater county, Wyoming, petitioned the War Department to station an efficient military force in that county to protect the miners from the depredations of hostile Indians.

In compliance with said petition the War Department, in June, 1870, established a military post in said county, consisting of two companies of troops, as a sub-station of Fort Bridger, W. T., designated as Camp Stambaugh (War Department Records), but soon after it was made an independent post, as shown by the following order:

"HEADQUARTERS DEPARTMENT OF THE PLATTE,
"OMAHA, NEB., *August* 20, 1870.

"GENERAL ORDERS, No. 35.

* * * * * * * *

"11. Camps Brown and *Stambaugh*, Wyoming Territory, heretofore sub-stations of Fort Bridger, W. T., are hereby announced as independent posts.

"By command of Brigadier-General Augur,

"GEO. D. RUGGLES,
"*Assistant Adjutant-General.*

"Official. (See official printed copy, Record.)"

This post, though located on unsurveyed lands, was laid off as a reservation by the officers in charge, and included all the territory within one mile in each direction from the flag-staff erected at the post. Government buildings were erected thereon, and military occupancy thereof maintained for over eleven years. The following communication from the Secretary of the Interior to the Commissioner of the General Land Office, dated June 6, 1881, will show the executive construction of the legal effect of such occupancy, and the manner in which this land was subsequently disposed of by the Interior Department.

> "From the statement of the War Department and your reports, it appears that there was never any formal establishment of the post nor order of the reservation of the lands lately occupied as a military encampment, known as Camp Stambaugh, * * * but that the occupation by the troops has been maintained for temporary purposes.
>
> *"Under these circumstances I do not consider the lands ever to have been regularly and properly subjected to the exclusive control of the War Department as an established military post.* Such also appears to be the opinion of the Secretary of War, as expressed in his letter of the 3d ultimo, advising me of the abandonment of the military.
>
> *"You are therefore instructed to regard them as public lands, subject to disposal, as though never made subject to such occupation."* (Copp's Public L. L., 1882, Vol. 2, p. 389.) (Italics ours.)

At the time this case arose (in 1881) there was no authority to dispose of military reservations except by special act of Congress (Donaldson's Pub. Dom., 249.) If, therefore, this was a reservation within the true meaning of that term, the department had no power to dispose of the same without such an act. The ruling of the Secretary of the Interior, the Secretary of War and the Attorney-General, therefore, is equivalent to a decision that the lands set apart by the order of the Adjutant-General did not constitute a military reservation, and could be disposed of without act of Congress, and conclusively support our contention that, in order to create a reservation which would take the land out of the operation of the act of 1826, which makes no exception of lands of this character (even if a reservation would

have done so), the land must be designated, described and declared by Congress, by the President, or by some head of department acting under his orders, within the scope of his authority.

In this case, as we have seen, there is nothing on the public records of the department with reference to the particular tract of land in question, until the reservation was declared in 1830. It was never designated. No specific order was ever given by the President, or any one for him, directing that this particular land should be reserved, or the possession of the specific tract should be taken by the troops of the United States. It was simply occupied in the ordinary conduct of military affairs by troops in the field, under orders emanating from the office of the Adjutant-General of the army.

As we have seen, the act of February 21, 1823 (3 Stats., 724) excepted lands "occupied for military purposes," and the Supreme Court in *Morrow* v. *Whitney*, 95 U. S., 551, 556, holds that "occupation" is a matter to be shown by parol evidence, while "reservation" is a matter of record to be proved by copy of the order of the President.

Secretary Smith, in his decision adverse to the Hackley heirs, and the demurrants in their briefs, have relied, in this connection, on the case of *Wilcox* v. *Jackson*, 13 Pet., 498.

In that case Jackson made pre-emption claim under the act of 1830, as extended by the act of 1834, based upon settlement made by one Beaubean. The act of 1834 expressly *excepted from its operations lands reserved by Congress, the President, or other competent authority, for any purpose whatever.*

The land in question was a part of Fort Dearborn, near Chicago. It appears that this post was established by the United States in 1804, and was under the control and occupancy of the government from that year until subsequent to the institution of the proceedings.

In 1817 Beaubean bought a house from an army contractor, located on the land embraced within the post.

In 1823 he purchased other houses located upon the property.

In 1824 the land was formally set apart by the Secretary of War as a military reservation.

In 1831 Beaubean made pre-emption claim to the land occupied

by him, which was rejected, upon the ground that the land was reserved for military purposes.

In 1834 he made another claim, which was rejected.

In 1835 his pre-emption claim was allowed by the Land Office at Chicago. He then sold his interest to the plaintiff, who attempted in an action of ejectment to recover possession from Wilcox, who was an officer of the United States army, in charge of the post.

The court held upon these facts that the land was reserved and appropriated by the United States, and no pre-emption right therein could be acquired under the act of 1830 or 1834, which acts, as we have seen, expressly excepted any lands reserved by Congress or the President, for any purpose whatsoever, a provision which was not contained in the act of 1826.

It was in this connection that the court used the following language, which is so earnestly relied upon by counsel for the demurrants, and made a basis for the decision of the Secretary of the Interior:

> "But we go further, and say that whensoever a tract of land shall have once been legally appropriated, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale could be construed to embrace it or to operate upon it, although no other reservation was made of it."

This broad statement is mere dictum. When carefully examined in connection with the facts of the case under consideration, however, it does not conflict with our position in this case. In *Wilcox* v. *Jackson,* the land had been set aside and enclosed as a military post thirteen years before the settlement was made, and was excepted, by the terms of the act under which the pre-emption was made, from the operation thereof. The court found as a fact that it had been actually appropriated by order of the President for military and light-house purposes. This may well be said to have been such an appropriation as to prevent the operation of the pre-emption act, which *expressly excepted* lands of this character from its provisions.

It is further noted that the court uses the terms "legally appropriated," which means that if the land is segregated or set aside

for a special purpose by authority of law. This is apparent from the opinion of the court, which refers to various acts of Congress involving such appropriation of the public lands, *i. e.*, the act of May 31, 1798, authorizing the President to erect fortifications; act of April 21, 1806, authorizing the President to establish trading houses at posts or places on the frontier; act of June 4, 1809, to erect fortifications for the protection of the Northern and Western frontier. And also an appropriation by Congress for the erection of a light-house on the land in question. But as we have seen, the courts hold that the only authority which can make such "legal appropriation" is Congress, which is given the power by the Constitution, or the President, or some head of department acting for the President, and that it must be done by designating the tract of land so as to sever it from the public domain. A mere occupancy by troops of the United States in temporary camp is not an appropriation of the land, for the term "appropriation" means a setting aside or severance from the general mass. It is certainly not an appropriation by an authority vested with the power under the law to appropriate the public domain, and as was said in *United States* v. *Tichenor, supra,* "Such use or occupation would not have the effect to import any special character to the land, or constitute a reservation," etc.

We submit, therefore, that the case of *Wilcox* v. *Jackson,* based upon facts which show that the land was actually reserved and a fortified post before settlement, and had remained in possession of the United States for years, and in which the pre-emption claim was made under an act expressly excepting from its operation lands reserved for any purposes whatever, can have no bearing upon the case at bar, in which there was no reservation until four years after the passage of the pre-emption act, and six years after settlement, and the act under which the complainants claim contained no such exception.

A further distinction widely separates the case of *Wilcox* v. *Jackson* from the case at bar, and effectually eliminates the former as an authority governing the latter. As stated the assignee of Beaubean claimed under the act of 1830. This act was passed six years *subsequent* to the formal reservation of the Fort Dearborn tract, while the Hackley heirs claim under the act of 1826,

which was passed four years *prior* to the reservation of Fort Brooke.

We further submit that the *dictum* of the court above quoted, even if it had the authority of a decision, would, when viewed in the light of the facts of the case, have no bearing upon this case.

It should be noted, also, that this is not a claim against the government, while all of the authorities cited, including those which we have cited in support of our position, involved a contest between the government and a private claimant. If the courts held against the government itself upon facts very much stronger in favor of reservation than those in this case, how much more readily should they support and establish a claim such as that of Hackley, and his legal representatives, in a contest between such claimants and subsequent settlers.

The government recognized that there was no reservation of this land prior to 1830, and on December 10th of that year an executive order was issued making such reservation.

The right of Robert J. Hackley must be tested by the conditions that existed at the time that the right vested, and not by conditions as they now appear. If in 1828, after the land office had been established, the troops had moved from the land in question, would any one have been so bold as to even suggest that under the act of 1826 Hackley could not have perfected his claim to said land? If his right was good in 1828, it has not been affected by the subsequent reservation or the occupancy of the government, which has simply delayed the enjoyment of the right.

U. S. v. *Fitzgerald,* 15 Peters, 419.

U. S. v. *Tichenor,* 12 Fed. Rep. 421.

It is submitted, therefore, that the mere occupancy of the land by the troops of the United States in a temporary camp or encampment, selected by a subordinate officer without specific orders from the President or Secretary of War, directing the occupation of the particular tract of land, as shown by the record in this case, could not constitute a military reservation, and could not give to the land any special character, or affect settlement rights thereon, further than to suspend the enjoyment of the right until the occupation ceased.

The real questions raised by the above specifications of demurrer for consideration are:

1. The Effect of the Occupancy of the Land in Question by the United States Troops from 1824 to 1830, and Subsequent Reservation in 1830, upon the Grant Made by the Act of 1826.

It is respectfully submitted that the occupancy of the land in question by the troops of the United States from 1824 to 1830 had no effect upon the rights of Robert J. Hackley under the act of 1826, further than to delay the perfection of that right and the enjoyment thereof, and that the effect of the subsequent reservation was the same. In other words, that the right or equitable title of Robert J. Hackley *vested upon the passage of the act of* 1826, but the *enjoyment* of that right and the *use of the land* was suspended during the occupation thereof by the government.

In another section of this brief we have established the contention that the act of 1826 was a grant *in presenti* to Hackley of an equitable interest in the land in question, which interest related back to the date of his settlement.

It is well settled that a grant *in presenti* may be made which will pass the interest or title sought to be conveyed, even though the land in question be occupied by the government or be in such a condition that the grantee cannot take immediate possession. The leading authorities upon this subject are those construing swamp and school grants, relating, in general terms, to lands of a given character or location. These grants pass the title to the State subject to occupancy, notwithstanding such reservation. The pre-emption act of 1826 passed an equitable title, and the principle underlying the two are the same.

In *Ham* v. *Missouri* (18 How., 126), the question of law involved was as to whether or not the school grant, under the act of March 6, 1820, for Missouri, was rendered inapplicable to certain land (thereafter in terms confirmed to the private land claimant by special act of Congress), by the proviso contained in the tenth section of the act of March 3, 1811, to the effect:

> "That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the District of Louisiana, and filed in his

office for the purpose of being investigated by the Commissioners appointed to ascertain the rights of persons claiming land in the Territory of Louisiana."

The court said (page 132):

"It may well be asked whether the language and objects of the latter can be made to import anything beyond a temporary suspension of the sales of the lands intended for sale, for the simple purpose of investigation; and much more, whether the tenth section of the act of 1811, and the proviso thereto, can be interpreted to mean a denial to itself by Congress of the right and power to sell or to give, either upon satisfactory evidence of the invalidity of any opposing claim, or upon considerations of public policy, the land embraced within the suspension.

"Such an interpretation, as it is not warranted by the language of the acts of Congress, seems not to accord either with considerations of justice or policy."

The court concluded that the provision for schools in the act of 1820 attached to the land, notwithstanding the legislative reservation, and that the title hereunder was paramount and superior to that sought to be granted to the private land claimant by an act of Congress passed subsequent thereto.

In *Beecher* v. *Wetherby* (95 U. S., 517), the question of law involved was whether or not the ownership of the lands by Indians under treaty at the date of the school land grant of August 6, 1846 (9 Stat. 56), and treaty reservation thereof for them at date of survey, inhibited the passage of the land under the grant. It was found by the court that by treaty of 1825 the land was recognized "as belonging to the Monomonee Tribe," which "embraced the section in controversy in this case;" that—

"In 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

As to the nature of the claims of the Indians, the court quoted from a former decision to show that:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In the case of the *State of Michigan* (8 L. D., 308), it appeared that prior to the date of the grant the land had been reserved by executive order for the purpose of supplying fuel for the garrison at Fort Mackinaw, and so remained until after the act of July 5, 1884, in which express provision was made for the sale of the lands in said reservation, the proceeds therefrom being constituted a fund for a specific purpose. Though surveyed prior to the grant, the State did not select the land under the swamp land grant of 1850, until subsequent to said act of 1884.

The question was sharply presented before the department as to whether or not the reservation defeated the operation of the grant. After a most exhaustive discussion of the whole subject, the conclusion reached was that—

> "It is, therefore, not inconsistent with the theory of a grant *in presenti* that the full fee and present enjoyment of rights under the grant should be subject to a contingency."
>
> * * * * * * * *
>
> "The swamp land grant is a grant *in presenti* vesting in the State the fee simple to all lands of that description at the date of the passage of the act, subject to the use of the government or other uses for which a reservation is made, so long as that reservation shall continue."

This principle has been applied in numerous cases to different states of fact.

> See *State of Louisiana,* 17 L. D., 440.
> *State of Wisconsin,* 19 L. D., 518.
> *United States* v. *Thomas,* 151 U. S., 577.
> *Stockbridge and Menesee Indians* v. *Wisconsin,* 25 L. D., 17.
> *State of Florida,* 25 L. D., 117.
> *Morrow* v. *Whitney,* 95 U. S., 551.

These authorities establish beyond controversy the proposition, that when a right or title of this character is granted by Congress, it immediately vests in the grantee, although occupancy or enjoyment of the right may be delayed for a long period of time.

The authorities cited deal, to a large extent, with the vesting of legal title, but it need hardly be suggested that the vesting and enjoyment of an equitable interest or title is governed by the same principles. In this case the perfecting of the equitable interest into a legal title by proof and entry, and the enjoyments of the property was delayed or suspended until the land was recently restored to the public domain; but the act of 1826 being unlimited as to the time in which the rights therein given could be perfected, the vested right given to Robert J. Hackley and his legal representatives has been in nowise affected by this delay.

U. S. v. *Tichenor,* 12 Fed. Rep. 415.
U. S. v. *Johnson,* 2 Ch. of Cl. 391.

It is equally well settled that reservation declared by the government after the pre-emption right has accrued can in no way affect that right, though it may delay the enjoyment thereof.

Thus, in *United States* v. *Fitzgerald,* 15 Peters, 418, the Supreme Court said:

> "It cannot be contended that the land in controversy was reserved from sale by any act of Congress, or by order of the President, unless the direction of the Secretary to reserve it from sale, several months after it had been actually sold and paid for, could amount to such an order. *As no reservation or appropriation of the land made after the right of the defendants accrued under the act of the 19th of June,* 1834, *could defeat that right,* it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation." (Italics ours.)

Morrow v. *Whitney,* 95 U. S., 551–556.

It is submitted, therefore—

(1) That the occupation of this land, prior to its reservation in 1830, did not affect its legal status as public land subject to the act of 1826.

(2) That the only effect of such occupation upon the rights of Hackley was to suspend the enjoyment thereof, and prevent the

perfecting of the equitable interest granted by the act into a complete legal title until such occupation terminated.

(3) That the formal reservation in 1830 could not affect the right of Hackley which had attached, further than to delay the perfecting and enjoyment thereof.

(4) That upon the termination of the reservation and occupation in 1883, the legal representatives of Hackley should have been permitted to perfect the right or interest granted by the act of 1826 into a legal title, in accordance with the provisions of said act, and the Interior Department and the court below erred in denying them this right.

VI. The Contention that Hackley Did Not and Could Not Perfect His Rights in Said Land During His Lifetime, and, Therefore, that Neither He, nor His Legal Representatives, Acquired Any Rights in or to the Same.

This contention is raised by section 4 of the joint demurrer (page —), which reads as follows:

> "It appears from the allegations of the complainants' bills, and from the exhibits attached thereto, that Robert J. Hackley did not, and could not, in his lifetime, conform to the requirements of section 1 of the act of Congress of April 22, 1826, and section 2 of the act of February 5, 1813, and, therefore, acquired no rights thereunder."

In this same connection we may also consider the fifth section of this demurrer (page —), which reads as follows:

> "Robert J. Hackley having failed to acquire any vested rights in and to the lands described in the complainants bills, at the time of his death he had no interest in the said lands which could descend to his heirs, the complainants herein."

These specifications or demurrer are based upon conclusions of law stated as facts, which conclusions are not sustained by the record, and are wholly denied.

We insist that Robert J. Hackley did, during his lifetime, comply with the provisions of the first section of the act of 1826, and with the second section of the act of 1813.

The first section of the act of 1826 only required that he should have settled upon and cultivated the land in question prior to the first of January, 1825, which settlement is found by the department to be a fact, and admitted by all parties.

The act of 1813, so far as applicable, only required that he should give notice of his claim two weeks before the beginning of public sales. We will discuss this question more at length under the subject of forfeiture. It is sufficient here to say that the record shows that Hackley did give notice, with proof of his claim, in 1835 to the Register and Receiver; and, in 1843,

and that his legal representatives again gave notice, describing the land by survey-lines after survey was made, in 1887. And no public sale of the land in question has been proclaimed by the President or made up to this time.

The real contention raised by these demurrers is that Hackley, by virtue of his settlement, acquired no such right or interest in the land, as would pass to his legal representatives or heirs-at-law.

We have already seen, however, that Hackley acquired, by virtue of the act of 1826, as construed by contemporaneous authorities, a vested right and equitable title to this land, which right or title would pass, as any other interest in real estate, to his heirs-at-law. But it is not necessary for us to establish this proposition, for the act itself grants the pre-emption right not only to the settler, but to his "legal representatives."

The term "legal representatives" has been construed by the Commissioner of the Land Office to mean representatives-in-law or heirs-at-law. Therefore, the act of 1826 gave to Hackley's legal representatives or heirs the same right which was granted Hackley himself, and it was not necessary that Hackley should prove his right during his lifetime in order that it might be acquired by his heirs.

The purpose of the law was obvious. It gave a pre-emption right to settlers upon unsurveyed lands in Florida, and, as contemporaneous records show, before these rights could be perfected after surveys, it frequently happened that the original settler was dead. The purpose of Congress was, that the right given to the original settler, and those who share the hardships with him, should not be lost simply because he died before it could be perfected. It will be found, therefore, that not only the act of 1826, but all of the early pre-emption acts giving the right of pre-emption as a reward for past settlement of cultivation, conferred the right not only upon the settler, but also upon his legal representatives as well.

The act of 1841, and subsequent acts, however, contained no such provision, for the obvious reason that future settlers were required to perform certain conditions precedent before they acquired any right.

In the opinion of the department, rendered in 1892, the Secretary bases his conclusion that Hackley acquired no right which could pass to his heirs upon the case of *Buxton* v. *Traver*, 130 U. S., 232, and this case is also relied upon by the demurrants. This case referred to a claim under the act of 1841, which only applied to surveyed lands, and gave pre-emption rights subject to conditions precedent, and contained no reference to "legal representatives." On the other hand, the act of 1826 is a grant to "every person, or the *legal representatives* of any person, who," etc. The act was as much a grant to the "legal representatives" of Hackley as to Hackley himself. It requires no discussion to show that the case of *Buxton* v. *Travers* could have no reference to cases arising under the act of 1826, which gave the right of pre-emption as a reward for past and executed consideration, and conferred the right in terms upon the "legal representatives" of a settler. The fact that the Interior Department utterly disregarded the terms of the act of 1826, and undertook to apply the case of *Buxton* v. *Travers* to a claim arising under that act is sufficient evidence of the character of investigation upon which that opinion was based.

In view of the terms of the act itself and the conditions surrounding its enactment, we do not feel that it is necessary to produce authorities to support our position on this point. To show the construction of the act as given by the department at the time, however, we furnish the following copies of final entry papers in two out of the many cases patented under the act of 1826 to the *heirs of settlers* who came within the terms of that act.

"No. 140. LAND OFFICE, *Dec.* 27, 1826.

"*It is hereby certified,* That, in pursuance of law, the heirs of Jno. Tanner, of Florida, on this day purchased of the register of this office, at Tallahassee, the lot or northwest quarter of section number thirty-three, of township number four north, in range number six west, containing 159.85 acres, at the rate of $1.25 per acre, amounting to $199.68¾, for which said heirs of Jno. Tanner has (have) made payment in full as required by law.

"*Now, therefore, be it known,* That on presentation of this certificate to the Commissioner of the General Land

Office the said heirs of John Tanner shall be entitled to receive a patent for the lot above described.

"G. W. WARD, *Register.*"

(Endorsed) "Pre-emption 140."

"No. 140. RECEIVER'S OFFICE AT TALLAHASSEE,

"*Dec.* 27, 1826.

"Received from the heirs of Jno. Tanner, of Fla., the sum of one hundred and ninety-nine dollars 68¾ cts., being in full for the northwest qr. of section 33, township 4, range 6, north and west, containing 159.75 acres, at the rate of $1.25 per acre.

"Dollars 199.68¾.

"R. K. CALL, *Receiver.*"

(Endorsed) "Pre-emption 140."

"No. 334. LAND OFFICE, *April* 6, 1827.

"It is hereby certified that, in pursuance of law, Cullen Edwards, heir of Shilo Edwards, of Florida, on this day purchased of the register of this office, at Tallahassee, the lot or east ½ of the N. west qr. of section number 2 of township number 2 north, in range number 4 west, containing 79.84 acres, at the rate of $1.25 per acre, amounting to 99.80, for which the said Cullen Edwards has made payment in full as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office the said Cullen Edwards shall be entitled to receive a patent for the lot above described.

"G. W. WARD, *Register.*"

(Endorsed) P(re-emption) 334, Tallahassee, pat. dated September 1, 1827. Recorded vol. 4, page 406."

(Duplicate.)

"No. 334. RECEIVER'S OFFICE, *April* 6, 1826.

"Received from Cullen Edwards, heir of Shilo Edwards, the sum of $99.80, being in full for E. ½ of N. W. section No. 2, township 2, range No. 4, no. west, containing 79.84 acres, at the rate of $1.25 per acre, $99.80.

"R. K. CALL, *Receiver.*"

"(Endorsed) Pre-emption 334."

It is respectfully submitted, therefore—

(1) That Robert J. Hackley did perfect his pre-emption right during his lifetime, and did comply in every respect with the terms of the act under which he claimed.

(2) That Robert J. Hackley did acquire a vested right or equitable title to the land in question, which would have passed to his heirs as an interest in real estate, even if said heirs had not been mentioned in the act.

(3) That, by virtue of the terms of the act itself, the pre-emption right or interest is granted to the "legal representatives" of Hackley as well as to Hackley himself. And, therefore, any right given by that act may be perfected by them as well as it could have been by Hackley.

As the result of our review of the law and facts, and of the positions taken by counsel for the demurrants, on this branch of the case, we respectfully submit that the proposition, that Robert J. Hackley and his legal representatives acquired a vested right to or interest in said land by virtue of the settlement and cultivation thereof by said Hackley, and the provisions of the act of 1826, is clearly established.

Let us now see if said right has been forfeited "by failure to perform the conditions annexed to it."

SECTION II.

HAS THE RIGHT OF PRE-EMPTION, ACQUIRED, BEEN FORFEITED BY ROBERT J. HACKLEY AND HIS LEGAL REPRESENTATIVES?

This question is raised by specifications 7 and 8 of the joint demurrer, pp 80, 81, as follows:

> "It does not appear in and by the allegations of the complainants' bills that a declaratory statement was filed by the administrator of the estate of Robert J. Hackley, or by his heirs, within three months after the receipts and filing at the district land office of the approved plat of the township embracing the alleged pre-emption settlement, as required by sections 2266 and 2269 of the Revised Statutes of the United States, and the failure to file said declaratory statement within the time prescribed by the act of Congress was a forfeiture of any rights Robert J. Hackley, or his estate or heirs may have acquired by virtue of the alleged settlement upon said government lands.
>
> "It does not appear in and by the allegations of the complainants' bills that the administrator of the estate of Robert J. Hackley, deceased, or his heirs, made proper proof and payment for the land described and claimed therein within thirty months after the date prescribed therein respectively for filing their declaratory notices had expired, as required by sections 2267 and 2269, Revised Statutes of the United States, and a failure to make such proper proof and payment within the period required by the act of Congress was a forfeiture of any rights that might have been acquired by virtue of the alleged settlement of Robert J. Hackley upon said land."

The facts of this case bring the claim of R. J. Hackley clearly within the purview of the act of 1826, under which it is contended he acquired vested rights. This being true, we have to deal alone with conditions *subsequent,* as contradistinguished from the conditions *precedent,* imposed by the pre-emption law of 1841 and amendments thereto.

By these paragraphs of the demurrer, however, it is contended, on behalf of the demurrants, that the provisions of sections 2266,

2267 and 2269 of the Revised Statutes of the United States apply to the case at bar, and thus, by implication at least, it is claimed that the acts of 1826 and 1813 have been repealed or modified by subsequent statutes.

In the discussion of this branch of the case it is contended:

1. That the acts of 1826 and 1813 remain in full force and effect, and are in no sense modified or repealed by subsequent legislation.

2. That each and every one of the conditions *subsequent* imposed by the acts of 1826 and 1813, under which the right of pre-emption vested, have been fully complied with, by Hackley and his heirs.

3. That even should said sections of the Revised Statutes be held to apply to the case at bar, the extraordinary diligence exercised by the pre-emption claims has been such that all of the provisions of said sections have been fully complied with.

4. That no effort has ever been made, by or in behalf of the United States, to effect a forfeiture of the vested pre-emption rights of Hackley or his heirs, such action being necessary to defeat their rights.

5. That even were the conditions subsequent, as prescribed in said acts of 1826 and 1813, not complied with, no forfeiture of said vested rights could or can be exacted at the instance of the defendants.

I. Acts of 1826 and 1813 not Repealed or Modified.

As shown herein, the character of the rights acquired by the pre-emption claimants under the act of 1826 were of such a nature as to absolutely vest in R. J. Hackley and his heirs a right, founded upon prior settlement and occupancy of the land, which could not be divested, even by act of Congress itself, in the absence of failure to comply with the provisions with respect to the acquirement of legal title.

"When covered by law, it becomes a legal right, *subject to be defeated only by failure to perform the conditions annexed to it.*" (*Lytle* v. *Arkansas*, 9 How., 334.)

As will be seen, Congress has not attempted to make other disposition of the land in question, or even to modify in any par-

ticular the statutes under which title to the land is sought to be perfected.

The act of April 22, 1826, was not a general, but a special and local statute, section 1 thereof relating entirely to the Territory of Florida.

Under the well-established rules of construction, the sections of the Revised Statutes referred to by demurrants must be held to apply to cases under the *general act,* and cannot modify, restrict, or add *new conditions* to the local act of 1826, under which rights had vested.

> "When the legislator frames a statute in general terms, or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation, to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the act shows a plain intention to do so." (Southernland on Statutes, sections 157, 158, Crow Dog.)

By references to sections 5595, 5596 and 5597 of the Revised Statutes, it will be seen that the revision and modification had relation to United States statutes "general and permanent in their nature"; and that the provisions for repeal are confined entirely to statutes embraced in some section of said revision:

> "Provided that the incorporation into said revision of any general and permanent provision taken from an act making appropriations, or from an act * * * containing other provisions of a private, *local,* or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, *local,* or temporary character contained in any of said acts, but the same shall *remain in force;* and all acts of Congress passed prior to said last-named day (December 1, 1873), no part of which are embraced in said revision, *shall not be affected or changed by its enactment.*" (Italics ours.)
>
> "Section 5597. The repeal of the several acts embraced in said revision shall not affect any act done or *any right accruing or accrued,* or any suit or proceeding had or commenced, in any civil cause, before the said repeal, but all rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made."

The acts of 1826 and 1813 were therefore not affected by or embraced in the codification of 1878, and the rights of the heirs of R. J. Hackley are in no way affected or governed by those sections of the general laws referred to by demurrants.

Indeed, by reference to these sections, as well as to the marginal notes with respect thereto, it will be readily discerned that they are based on the modern pre-emption system which had its beginning in the act of 1841, and was extended by the acts of March 3, 1843 (5th Stats., p. 620), and May 30, 1862 (12th Stat., p. 410).

The pre-emption claimants under the acts of 1826 and 1813 were not required to file declaratory statements, and the conditions prescribed by those laws are wholly *conditions subsequent.* As we have seen, the act of 1826 is one of those early statutes which were of a remedial nature, and passed for the expressed purpose of securing title to those who were *bona fide* occupants of and settlers on the public lands prior to the date of the statutes, before permitting the disposition of lands in the territory affected by general sales or otherwise. The Supreme Court of the United States in the case of *Moore* v. *Robbins,* 96 U. S., 530, held that it was by the act of September 4, 1841, that Congress "for the first time established the general principles of pre-emption, and which has remained the basis of that right to this day."

Any reference, therefore, in the Revised Statutes to pre-emption laws must be held to refer to the general act of 1841 and amendments thereto.

We respectfully submit, therefore, that the act of 1826 is still in force; that the provisions of the Revised Statutes referred to have no reference to rights acquired under that act; that the provisions of the sections relied upon by the demurrants were not "conditions annexed to" the "legal right" which vested in Hackley and his legal representatives in 1826, and cannot now be added to that act to defeat the rights given therein. We stand upon the declaration of the Supreme Court in *Lytle* v. *Arkansas,* that this pre-emption right can be defeated *"only* by failure to perform the *conditions annexed to it,"* and insist upon our rights being measured by the provisions of the act under which they vested.

II. The Acts of 1826 and 1813 Have Been Complied With.

Keeping these principles in mind, let us examine the *conditions subsequent,* provided in the statute of 1826, for failure to comply with which Hackley or his heirs could alone forfeit his or their rights in the premises.

The second section of the act of 1813, which contains the conditions imposed by the act of 1826, provides that—

> "Every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office for the district in which the land may lie, wherein he shall designate the quarter section he claims, which notice the Register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the Register of the Land Office on producing his receipt from the Receiver of Public Moneys for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale, provided that all lands to be sold under this act shall be entered with the Register at least *two weeks before the time of the commencement of public sales,* in the district wherein the land lies; and every person having the preference in becoming the purchaser of a tract of land, who shall *fail to make his entry with the Register within the time prescribed, his rights shall be forfeited,* and the land by him claimed shall be offered at public sale with other public lands in the district to which it belongs." (Italics ours.)

An analysis of this section will show that there were but two conditions imposed upon the pre-emptor:

First. He should make known his claim by delivering a *notice in writing* to the Register of the Land Office in the district in which the land may be, designating the quarter section he claims.

Second. He shall, after it shall appear to the satisfaction of the Register and Receiver that he is entitled under the act, enter

the land with the Register at least *two weeks* before the time of *commencement of the public sales* in the district wherein the land lies, producing his receipt from the Receiver for a one-twentieth part of the purchase-price.

By the previous act of March 31, 1808 (Revised Stat., 2359), it will be seen that no public sales could be made without advertisement of from three to six months prior to the date of sale. So that the limitations prescribed by the act of 1813, made applicable to Florida by the act of 1826, were based upon ample notice of such public sales, so as to give the pre-emptor the opportunity to make entry before his rights could be barred.

It will be noticed that the act of 1826 placed *no limit* upon the time within which the right therein could be perfected, except as to lands offered for public sale, and the department has held time and again that where the act placed no limit it could place none.

On August 23, 1830, Attorney-General Berrien (Att'y-Gens'. Opins., p. 779), in discussing the provisions of the act of 1830, which was similar to the act of 1826 (except that it reserved certain lands from the operation of the act, expressly inhibited the assignment of rights and limited its operation to a period of one year, while in the act of 1826 there were no reservations or limitations), says:

> "Here is an unqualified right of entry to all persons who had the possession, and who made the cultivation required by the act, which right of entry, so far as this section provides, is *unlimited as to time,* while the act which confers it imposes upon the person claiming it *no* obligation to give notice of his claim." (Italics ours.)

In discussing the provisions of that act in detail, he says with respect to the pre-emption right:

> "Subject to these exceptions, it is an unqualified right, and its exercise *is not restricted as to time,* except in case of *lands offered for sale* under the proclamation of the President, in regard to which it is limited by the time appointed for the commencement of the sales, and in relation to all others by the *duration of the act.*" (Italics ours.)

In *Lytle* v. *Arkansas,* 9 Howard, 344, the Supreme Court,

speaking of the pre-emption right conferred by the act of 1830, says:

> "But when covered by law it becomes a legal right, subject to be defeated *only by failure to perform the conditions annexed to it.*" (Italics ours.)

We have seen by an examination of the statute, and the construction of a similar statute by the Attorney-General, that the only two conditions required of Hackley by this act were to *give notice to the Register of his claim,* which notice should be given at *least two weeks before the beginning of public sales.* It further appears that there is *no limitation* upon the time within which he could give this notice, except the limitation as to the *beginning of public sales.* The decision of Secretary Smith, Exhibit "J," p. 59, to the bill, contains the following:

> "Under the authority vested in the Commissioner of the General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into the market and disposed of the same at public auction the lands included in Fort Brooke Military Reservation; but he was not compelled to do so, and *up to this time has made no effort to have the same disposed of in that manner.*" (Italics ours.)

The time, therefore, within which Hackley or his legal representatives could perfect their claim of record, as required by the statute, *has never yet elapsed.*

It also appears from the decision of the Honorable Secretary of the Interior, as a finding of fact accepted as true by the bill and admitted by the demurrants, that the approved plat of survey of the land in controversy was not filed in the local land office at Gainesville, Fla., until March 22, 1883, and "that on April 2d thereafter said officers were directed to allow no entries on any land within said reservation." (Pp. 56, 57.)

It also appears by the decision (page 63) that this order of suspension remained in force until revoked by this decision of the Secretary under date of July 24, 1894.

In this connection attention is called to the fact that the act of 1826 differed further from the act of 1830, in that the act of 1830 was limited in its operations to one year from the date

thereof. It being impracticable to make proof and payment in advance of the filing of the plat of governmental survey, Congress, by the act of July 14, 1832 (4th Stat., 603), extended the provisions of said act; and thereafter, for the same reason, the provisions of the act of 1830 and of 1832 were further extended by the act of 1834, the first section of which reads as follows:

> "That all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of an act of Congress approved on the twenty-ninth of May, 1830, and who have not then, or shall not be enabled to make proof and enter the same within the time limited in said act, *in consequence of the public surveys not having been made and returned,* or where the land was not attached to any land district . . . . . the land occupants shall be permitted to enter the said lands upon the same conditions in every respect as are prescribed in said act, within one year *after the surveys are made,* or the lands attached to a land district, or the boundary line established; and if the said lands shall be proclaimed for sale before the expiration of one years, as aforesaid, when they shall be entered before the sale thereof."

Under date of June 19, 1832 (Vol. 2, Public Land Laws, p. 556), in instructions to the Register and Receiver at Mount Salus, Miss., the Commissioner of the General Land Office clearly states that notice shall be given of the receipt of plats before a pre-emptor shall be required to proceed to perfect his claim. And in instructions of February 8, 1832 (Public Land Laws, p. 559), to the Register and Receiver at Springfield, Ill., the Commissioner held that even where plats were received, the recording of the land as subject to private entry where there had been failure on the part of the pre-emptor to proceed, was confined to lands which had been *actually offered for sale.*

By postscript to general circular dated October 11, 1837 (Public Land Laws, p. 652), to the Registers and Receivers, general instructions were given by the Land Department, as follows:

> "And from time to time hereafter, whenever plats are received at your office (the date of such receipt to be noted on the face of the plat), you are required to give public notice of the fact through the most convenient newspaper,

> and request claimants to pre-emption rights to file their testimony and complete their payments."

The instructions last quoted doubtless had relation to the public notice required before pre-emption claimants could be expected to perfect their claim in local land offices, under the acts of 1826 and 1813, and as well as those under intervening acts; and while the statutes of 1830 and 1832, expressly limiting pre-emption claimants to one year after the passage thereof within which to perfect their claims, do not necessarily apply to the claimants under the act of 1826, it is interesting to note the course pursued by Congress with respect to these later acts, which renders incontrovertible the contention that there was *no restriction* as to the *time required* for the perfection of pre-emption claims under the act of 1826, anterior to a proclamation of the President *fixing the date for public sale in the district embracing the lands covered by such claims.* Pre-emption claimants under the act of 1826 could not be expected, any more than those under the acts of 1830, 1832 and 1834, to describe their lands according to survey, calculate the amount of money required to be tendered by means of the acreage of land to be shown by the plat of survey, before the approval of such plat and its filing in the local office.

Both the department and the courts, by contemporaneous construction, recognized that a notice substantially describing the land claimed, where the same had not been surveyed, was a sufficient compliance with the act. Thus, in a communication from the Commissioner to the Register and Receiver at Palmyra, Mo., September 21, 1824, relative to claims under the act of April 12, 1814 (5 Stats., p. 122), section five of which was in the same terms of the act of 1826, it is said:

> "When applications are made to enter pre-emptions previous to the surveying of the lands, and there is apprehension of loss of testimony by death or otherwise, you will permit the right of entry to be established, and the *payment* and *entry* could be made *after the surveys were returned.*" (Italics ours.)

Lytle v. *Arkansas,* 9 How., 334, it was urged against the claim of Cloyes that no proof had been made since survey, his notice

and proof having been given before 1831, and surveys not having been made until 1833. In discussing this point the court said:

> "Under those acts Cloyes was only required to do what was necessary to perfect his right. But those steps within the law which had been taken were not required to be taken again.
>
> "It is well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the Receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the Register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes, or his representatives, had been permitted by the land officers to do what, in this respect, was offered to be done."

We will now show that Hackley, during his life-time, fully complied with the terms of the statute, as construed by the Commissioner, and by the Supreme Court of the United States, and that his legal representatives, after survey of the land, fully complied with the letter of its provisions, by giving notice, describing the land in accordance with the survey-lines, and tendering the full purchase price therefor.

We have seen that the Land Office for the district in which the land was located was not established until 1828, and the bill alleges that as soon as communication with said Land Office was practicable, to-wit, in the year 1835, Hackley filed with the Register and Receiver a written notice, *designating in an intelligible manner* the land which he claimed, and submitting therewith the *evidence of his claim.* This in itself constituted compliance with the requirements of the act of 1826, as far as possible in advance of governmental survey, and constituted a valid, actual notice of his pre-emption claim under the statute. As shown by the authorities cited under the practice at that time, where land

had not been surveyed, a notice of this character was accepted as a compliance with the act.

But Hackley did not stop here. In 1843, when the Land Office at Newnansville was opened, he secured from the Land Office at St. Augustine certified copies of the *evidence of his claim*, and filed with the Register and Receiver at Newnansville another *notice* (page 9), which read as follows:

> "SIR: You will take notice that I claim the right of pre-emption of a tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved April 22, 1826, and that I have filed proof of the same in the Register's Office at St. Augustine."

Here was another notice, which constituted a compliance with the requirements of section 2 of the act of 1813.

Thereafter, in the year 1845, Mr. Hackley died in Florida, where he had continuously resided; but his legal representatives have continuously asserted the pre-emption claim, so initiated and proven, unto the present time. The land was included in the Fort Brooke Military Reservation by executive order of 1830, and remained unsurveyed until 1883. As heretofore shown, within ten days after the plat had been filed in the Local Land Office, entry thereof was prohibited by order of the Commissioner of the General Land Office, and said plat was suspended, and remained so until revoked by the Secretary of the Interior in his decision of 1894.

The plat having been suspended before the expiration of the time allowed them to perfect their claim under the act of 1826 and 1813, the heirs of Hackley waited for the revocation of said order of suspension in order to further press their claim until October 14, 1887, when they *filed a further notice of their claim* to the right of pre-emption and purchase of said land through their agent, T. H. Randolph, who also *applied to enter* said land according to the official survey for the heirs of Robert J. Hackley and as administrator of his estate, *and tendered therefor the purchase price.*

Here was a complete and absolute compliance with the letter of the second section of the act of 1813, not only giving notice of lands, but describing exactly, *by survey, the lines and location*

of the land which was claimed. That notice, too, was given more than two weeks before any public sale of this land, for, as before shown, *it has never been offered at public sale.*

The application and tender were rejected by the Register and Receiver, not upon the ground of any defect in the claims of said Hackley, but upon the ground that the land was then a part of *Fort Brooke Reservation,* and not subject to entry, the plats being still suspended by the order of the Commissioner dated April 2, 1883.

We are unable to see what further could have been done by either Hackley or his heirs to comply with the requirements of the law, or upon what ground it could possibly be claimed that their rights under the act of 1826 were forfeited for failure to comply with the conditions *subsequent.*

The Register and Receiver, the Commissioner of the General Land Office, and two Secretaries of the Interior have passed upon this subject, and have all found as a fact that Hackley did comply with the requirements of the acts of 1826 and 1813. The Register and Receiver, in their opinion, which is made a part of the opinion of the Commissioner (Exhibit "G," pp. 27, 28) found that—

> "Hackley made entry in good faith, and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, and we consider his claim superior, in the absence of an adverse claim, to the claims made after the abandonment of the fort in 1883."

They also (page 28) say:

> "Inasmuch as the widow and heirs of Hackley have continued to prosecute their claims for the right to purchase the abandoned reservation, we believe that their claim is entitled to serious consideration."

The Commissioner, in his decision (page 34), states, with reference to Hackley's claim:

> "He appears, in fact, to be the first white man who ever lived on the land. He unquestionably is fully protected by the act of 1826, and the act of 1858, and that of July 5, 1884. He meets the requirements of the first proviso of the second section of the latter act."

In thus deciding in favor of Hackley's claim, the Register and Receiver and the Commissioner necessarily found that he had complied with the provisions of the act under which he claimed, and their findings of fact upon this subject were adopted and approved by each of the Secretaries of the Interior, who passed upon the question.

The acts of 1826 and 1813 have been fully and completely complied with by R. J. Hackley and his legal representatives.

III. The Revised Statutes Have Been Complied With.

As shown above, sections 2266 and 2269 of the Revised Statutes in no way modify or repeal the acts of 1826 and 1813, and do not apply to the character of pre-emptions involved in these suits, and we insist, for reasons already given, that they have absolutely no bearing upon this case. But it is submitted that, even should the same be held to apply to the case at bar, their requirements have been fully met.

Demurrants contend that the legal representatives must have filed a declaratory statement, as required by said sections, within three months after the receipt of the approved plat by the Register and Receiver, and must also have made proper proof and payment within thirty months from the date prescribed therein. As suggested above, the first reference in any land laws to the declaratory statement is found in the *act of* 1841, and it is simply a form of public notice for the protection of subsequent settlers, like our recordation acts.

It will readily be seen from the authorities cited, both in behalf of the complainants and the demurrants, that declaratory statements required by the act of 1841 could not be filed until after the lands were surveyed; and, indeed, it was not until the passage of the act of 1862 that a pre-emptor, under the general pre-emption system, could initiate a right as against the United States to unsurveyed land, although it has always been the practice, as between individuals, to award to settlers preference right of entry, according to the relative dates at which they severally settled upon the public lands in good faith for the purpose of eventually acquiring title under the pre-emption laws.

Frisbie v. *Whitney*, 9 Wall., 187.

The earliest time at which the filing of a declaratory statement was required by any law was three months after the plat of survey had been approved and filed in the local office.

The object of the declaratory statement was primarily to give notice to other settlers of the claim.

At any time subsequent to the date at which a plat of survey was filed, a *suspension* of such plat or of the land from entry has always operated as a *stay* of proceedings during the *period* of such *suspension*, and this is true also in the matter of computing the time within which final proof is required by the statute to be made in pursuance of the pre-emption laws under the general system as inaugurated under the act of 1841.

In this particular, the pre-emption law is similar to the homestead law, also founded solely upon conditions precedent, and authorities on the subject of stay in the running of time pending suspension as to homestead cases apply as well to those involving a pre-emption claim of the character contemplated by the act of 1841, and subsequent statutes incorporated into said sections of the Revised Statutes.

Lambert v. *Lambert*, 21 L. D., 169.
Albert H. Hooper, 12 L. D., 633.
Smith v. *Lochran*, 22 L. D., 578.
Beley v. *Cooke*, 15 L. D., 215.
Ludwig May case, 13 L. D., 297.
Mather et al v. *Hackley Heirs*, 19 L. D., p. 48.

In the case of *Lambert* v. *Lambert*, *supra*, it was held (syllabus):

> "The statutory period within which proof should be submitted under a homestead entry does not run during the pendency of an order suspending the final survey of the land."

In this case application to make final proof was not made until over a year and a half after the expiration of the seven years within which final proof was required by the statute to be made.

In the case of Hooper, *supra*, it is held (syllabus):

> "Final proof should not be accepted while the survey of the township in which the land is situated is suspended for investigation."

In the pre-emption case of May, *supra,* it is held (syllabus) that—

> "An entry made while the township plat is on file is not annulled by the subsequent withdrawal of said plat, but *suspended during said withdrawal.*" (Italics supplied.)

In the case of *Beley* v. *Cooke, supra,* it is held (syllabus):

> "The suspension of the township plat pending the settlement of a private claim excuses a homesteader during the period of suspension from establishing a residence under an entry made prior to the order of suspension."

In the case of *Mather et al* v. *Hackley heirs* (*supra*), *in the very decision under which the defendants claim,* this doctrine is recognized and followed. As stated, the plat was filed March 22d, and suspended by order of the Commissioner of April 2, 1883. Mr. Secretary Smith (pages 63 and 64) said:

> "The claims of Julius Cæsar, . . . Martha Stillings, wife and heir of Andrew Stillings, deceased, . . . and that of Frank Jones . . . are in the same condition as that of Louis Bell, with the exception that said claims were not asserted until subsequent to the date of the order from your (Commissioner's) office directing that no entries be allowed upon the land of said reservation.
>
> "The settlement rights of Cæsar, Stillings and Jones had attached prior to the date of said order, and *were simply held in abeyance* by it." (Italics ours.)

It will thus be seen that, even under sections 2266 and 2269 of the Revised Statutes, the contention of demurrants must fall, as but ten days elapsed from the date of the filing of the approved plat until the date of the suspension thereof, and the Hackley heirs had remaining to their credit a period of eighty days within which to file said statement, and twenty-nine months and twenty days within which to make final proof, even if they had not already filed a valid declaratory statement within the purview of said sections of the Revised Statutes.

It is contended, therefore, that the character of the notice given by the administrator of Robert J. Hackley in behalf of his heirs, in October, 1887, drawn as it was in the light of the acts of 1826 and 1813, as well as the provisions of sections 2266 and

2269 of the Revised Statutes, is sufficiently broad to meet every requirement of the act of 1841, and said sections of the Revised Statutes, insisting always, however, that these statutes can have no bearing upon this case, because the "legal right" of Hackley and his legal representatives could only be forfeited for failure to perform the "*conditions annexed to it.*"

Authorities Cited by Demurrants.

Demurrants have cited cases which arose under the pre-emption system inaugurated in 1841, and which relate to cases in which there was such a different state of facts as to be utterly inapplicable to the case at bar, even though the Hackley claim should have to stand or fall upon sections 2266 and 2269 of the Revised Statutes, which sections we earnestly insist have nothing whatever to do with this case.

In the case of *Lansdale* v. *Daniel,* 100 U. S., 113, the declaratory statement was filed by defendant prior to the time at which the land became subject to entry, and was declared to be a nullity, while the plaintiff in that case did not file his declaratory statement for some two years after the land became subject to entry. The court said:

> "The rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as, in the latter event, it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim."

In this case it will be seen that there was no question of suspension.

In the case of the *Northern Pacific Railway Company* v. *DeLacey,* 174 U. S., 631, the sole question involved was whether or not the declaratory statement made by one John Fleet for land within the primary limits of the grant to said railroad under date of April 9, 1869, served to except the land from the attachment of the right of the road thereto upon the filing of the map of definite location on March 26, 1884. In this case there was no question as to the fact that prior to the date of the filing the land had been surveyed, and all the necessary steps had been taken to render the land subject to entry. This suit was in ejectment by

the plaintiff company, to which patent had been issued by the Land Department in 1892, and the defendant in possession was defending upon what he conceived to be the weakness of his adversaries' title, the questions of fact in the case having been finally decided by the Land Department in 1891. By reference to the departmental decision as to the facts (evidently a part of the record before the court) as reported in 13 L. D., at page 617, it will be seen that the defendant, DeLacey, who was a homesteader, had initiated his claim in 1886, about two years subsequent to the attaching of the railroad's claim on definite location.

The department further found as a fact that—

> "The testimony shows beyond all question that Fleet had abandoned the land on May 14, 1874, when the road was definitely located, and at that time he was cultivating and improving the tract embraced in his homestead entry, made prior to said date of definite location. . . . .
>
> "Considering that his homestead entry was equivalent to the relinquishment of his pre-emption filing, and was of itself an act of abandonment of the land covered by such filing, I do not deem it necessary to consider the other points argued by counsel; to-wit, that Fleet was disqualified from making a pre-emption entry by reason of having previously received patents for 320 acres under the Oregon Donation act."

It further appeared, both in the decision of the Land Department and the findings by the court, that Fleet, in 1870, had acquiesced in the decision of the local officers to the effect that the tract covered by D. S. filing was railroad land, and "he had lost it"; and it was not until September 7, 1887, nearly eighteen years after the date of his filing, that he submitted final proof.

It will thus appear that the decision of the Supreme Court in this case has no application to the case at bar, in that it was based upon the pre-emption system, as inaugurated in and subsequent to 1841, and is a case where there was neither suspension of plat nor entry to excuse the performance of the condition *precedent* imposed by the general pre-emption law.

The case of *Gonzales* v. *French*, 164 U. S., 338, is a suit in equity, to declare a trust, instituted by the plaintiff against the defendant as the probate judge, to whom patent issued for the

benefit of the town under special act of Congress, approved February 3, 1899, under which act land reserved for school purposes in said territory could be appropriated for town purposes. The plaintiff claims as assignee of a pre-emption settler on unsurveyed land. The land when surveyed proved to be in section 16, and was, therefore, reserved for schools. The land was surveyed in 1878, but the plat thereof was not approved and filed in the local office until February 3, 1879. Thereafter, in June, 1883, plaintiff bought improvements of occupants and took possession. On April 2, 1885, she made application to the local land offices, and filed pre-emption declaratory statement and tendered proper fees; her application was rejected on the ground that the land was reserved for school purposes. She acquiesced in this decision, and "took no further steps until July 20, 1889, when she ineffectually opposed the claim of the probate judge in making his entry" under the special statute mentioned. The Supreme Court sustained the decision of the Supreme Court of the territory to the effect that—

> "The land in question was never divested of its character as school land until the entry by the probate judge under the act of 1889."

The person from whom the plaintiff purchased improvements never placed any claim for the land of record whatsoever, and there appears to have been no suspension of the plat. This case, therefore, is clearly inapplicable to the case at bar.

In the case of *Moore* v. *Robbins,* 96 U. S., page 530, the question under consideration by the Supreme Court of the United States was the relative rights of those claiming under the public sales made in pursuance of a proclamation of the President, and those claiming under the person who apparently did not initiate his pre-emption claim of record until more than three months from the date of his alleged settlement, and the commencement of the public sales, and who did not tender any money in payment for the land until three months *after such public sale* was actually made. The Supreme Court held (syllabus) that:

> "Under section 14 *of the act of* 1841 (5 Stats., 457) and the act of *March* 3, 1853 (10 Stats., 244), no pre-emption claim was of any avail against a purchaser of the land *at the*

> *public sales ordered by the proclamation of the President,* unless before they commenced, the claimant had proved up his settlement and paid for the land." (Italics ours.)

This case, of course, is inapplicable to the case at bar in that the pre-emption claimant is claiming under a different law. Bunn presumably had the requisite notice and time, and failed to make both proof and payment until after public sale. As stated in the *case at bar,* the lands have *never yet been offered at public sale.*

The case of *Atherton* v. *Fowler,* 96 U. S., page 513, and cited by counsel, has been hereinbefore distinguished. It presents no question pertinent to this phase of the case, and the same is true with the case of *Johnson* v. *Tousley,* also cited.

It will be seen, therefore, that while the case at bar does not come within the purview of sections 2266, 2267 and 2269 of the Revised Statutes, the course pursued by Robert J. Hackley and his legal representatives has been such as that each of these very provisions of said statutes have been fully complied with, were such compliance necessary.

IV. The United States Never Attempted to Exact Forfeiture.

There can be no question of the fact that upon the passage of the act of 1826, there became vested in Robert J. Hackley and his legal representatives, a right of pre-emption which could not be divested except upon "forfeiture," duly enforced for failure to perform conditions subsequent, as specifically set forth in section 2 of the act of 1813. It has been shown that no one of these conditions have been broken, but, on the contrary, they have been fully performed, both in letter and in spirit, by the pre-emptor and his legal representatives. But even if this were not the case, it is a well-established principle of law that there must needs be some actual and proper action taken by the grantor before forfeiture can be effected of vested rights.

In this case there has been an utter failure on the part of the grantor, the United States, to take any action whatsoever looking to the exaction of a forfeiture. On the contrary, the pre-emption right of Hackley and those claiming through him was never adjudicated until the decisions of the Register and Receiver in

1889, of the Commissioner in 1890, and the Secretary of the Interior in 1892 and 1894. Both the Register and Receiver and the Commissioner held that Hackley's rights vested under the act of 1826, and that each and every one of the conditions subsequent had been duly complied with by the pre-emptor and his legal representatives.

In rejecting the Hackley claim, the Secretary of the Interior did not overrule the findings of fact by the Register and Receiver or the Commissioner of the General Land Office as to the acts performed by Hackley and his heirs in their efforts to acquire title to the land in question, but decided as a conclusion of law that the land itself was never in such condition as to enable Hackley to initiate a valid claim to it under the acts of 1826 and 1813. The only question, therefore, is between individual claimants. The United States claims no forfeiture.

It is a well-established principle of law that the exaction of a forfeiture for non-performance of conditions subsequent is not within the jurisdiction of the Secretary of the Interior.

> "The mode of asserting or resuming the forfeited grant is subject to the legislative authority of the government."

Since the opinion of the Attorney-General of the United States in the case of the Atlantic and Pacific Railroad Company land grant (XVI. Atty. Gen. Ops., 572), it has been uniformly held that the Secretary of the Interior has no authority to declare a forfeiture. On the contrary, even in the face of direct and unequivocal acts of forfeiture the department proceeds to convey legal titles in the *absence of legislative action,* looking to the exaction of forfeitures. In this opinion the Attorney-General said:

> "I am, therefore, of opinion that the grant to the railroad had been forfeited by failure to build its road within the time named in the act, no action, by reason of its failure to perform the conditions, having been taken by authority of Congress. It being, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and until in some form advantage shall be taken of the conditions, it would be the duty of the Executive Department to give it the benefit of the grant."

But even should it be held that the conditions subsequent im-

It is respectfully submitted, therefore:

(1) That the acts of 1826 and 1813 remain in full force, in no way modified by subsequent *general* legislation, and that the "legal right" which vested in Hackley and his legal representatives upon the passage of the act of 1826, could only be defeated by the failure to perform the "conditions annexed to it," followed by some act enforcing forfeiture on the part of the government.

(2) That Robert J. Hackley fully complied with the conditions contained in the acts above mentioned by his notice and proof in 1835 and 1843, and that his legal representatives complied with the letter and terms of said acts by their notice, given in 1887, accompanied by application to enter, and a tender of the full purchase-price.

(3) That even if the sections of the Revised Statutes relied upon had any application to this case (which we insist they have not), the complainants have fully complied with their provisions by the notice or declaratory statement, filed in 1887, before the time provided by such statutes had elapsed.

(4) That there has never been any action on the part of the government looking to the forfeiture of the right of Hackley, or his legal representatives; but, to the contrary, the Register and Receiver and Commissioner, decided in favor of the Hackley heirs, and the Secretaries of the Interior only rejected their claims for legal reasons, in no way connected with the forfeiture.

(5) That the question of forfeiture cannot be involved in this case for the reason that it is a contest between individuals, in which the government is not interested, and even if Hackley, or his legal representatives, had failed to comply with the conditions subsequent named in the acts, the demurrants could not take advantage of their failure.

For these reasons it is submitted that the demurrer under discussion upon this branch of the case are not well taken.

PART II.

OF THE TECHNICAL GROUNDS OF DEMURRER.

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I. Want of Specific Allegation of Error in Construction of Law by the Interior Department.

This ground of demurrer is expressed in section 12 of the joint and several demurrer filed by the defendants other than Finley, p. 81, as follows:

> "There is no specific allegation of error of construction of law in complainants' bills, and in the absence of such specific allegation this suit cannot be maintained, and complainants' bills should be dismissed."

While satisfied that the bill as originally filed was not defective, as contended by this specification of demurrer, yet, to relieve the case of the possible objections of this ground and any complication which might be avoided, complainants, by leave of the court, amended the bill as appears, pages 86 and 87, by inserting the averment that "the said decision of the Secretary of the Interior awarding the right to enter said lands as aforesaid was based upon erroneous conclusions of law."

We would add in this connection, however, that in the bill under consideration the complainants set out first in detail their title and interest, the statutes and the facts upon which they base their claim. They set out the finding of the facts by the different officers of the Interior Department, beginning with the Register and Receiver, and filed the opinions of these officers (as exhibits) as a more complete statement of the facts as found, praying that they may be taken as a part of the bill; that the Secretary of the

Interior, after approving the finding of the facts as made by the Register and Receiver, and Commissioner of the General Land Office, in so far as they affect the rights of the complainants, held upon conclusions of law adversely to the complainants. Copies of the decisions of the officers of the Land Department are in each instance attached as exhibits to and made a part of the bill of complaint. The bill alleges that, upon the law and facts as set out, the complainants were entitled to this land, and that they are the equitable owners of the same, but that the Interior Department upon erroneous conclusions of law issued patents to the defendants.

The distinction should be carefully drawn between the class of suits to which the cases under consideration belong, and those suits which are brought by the government to cancel, annul or set aside a patent. In the latter cases (upon which the demurrants rely) the basis of the action is fraud or mistake of law. The government—the plaintiff—does not rely upon its *original title* or original right, but rather upon the *fraud* or *mistake,* and, therefore, not only facts which show fraud or mistake must be alleged, but there must be a specific allegation of fraud or mistake, as this is the basis of the action. In this class of cases there is no claim by virtue of an error in the construction of law, as in the case at bar, in which complainants rely upon their original right to the land under the law, and pray that this right may be protected and perfected by requiring a conveyance of the legal title which has been transferred to some one else in violation of their rights. It is only necessary, therefore, to the action to allege such law and *facts* as show that their right is superior to that of the patentees, and that they are indeed entitled, under the law, to the land, and when the court will, in protection of that right, require the conveyance of the legal title. If it appears upon the face of the bill that the complainants have a right to the land, it necessarily follows that the department committed an error of law (the facts being admitted) in issuing the patents to the defendants.

The authorities cited in the court below by counsel for the demurrants upon this point, and upon the kindred subject of *res adjudicata* next considered by us, do not in any way militate against the position taken by us. This is so apparent that we

deem an extensive and detailed review of them in this brief unnecessary. Many of these cases are suits by the United States to set aside patents for fraud, which, as we have seen, proceed upon an entirely different principle. See *U. S.* v. *Atherton,* 102 U. S., 372. Others are cases where the decisions of the department are not filed, and the allegations were not sufficient to enable the court to ascertain from the record whether there was an error in the construction of law or not. For example see *Marquiz* v. *Frisbee,* 108 U. S., 478. Where the authorities cited apply at all, they support rather than negative our contention.

As an illustration of this we quote from the opinion of Mr. Justice Field in the leading case of *Lee* v. *Johnson,* 116 U. S., 48:

> "The defendant in the court below, the plaintiff in error here, is the holder of a patent of the United States for a parcel of land in Michigan issued to him under the homestead laws, and the present suit was brought to charge him, as trustee of the property, and to compel a conveyance to the plaintiff. The patent having been issued by officers of the Land Department, to whose supervision and control are entrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name and by its authority. If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. *The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.*" (Italics ours.)

In the case at bar we are only asking the court to do what, in our view of the law, the Interior Department should have done, to-wit, to protect the right of the complainants, a right not based upon any *error* or *fraud,* but upon the original settlement of their decedent and the act of 1826.

II. Objection that the Matters in Issue, Having Been Decided by the Interior Department, are now Res Judicata.

This objection appears in the last specification of the demurrer of S. Y. Finley, page 84, as follows:

> "7th. Because the complainants' said bill and exhibits show that the Land Department of the United States has fully and finally adjudicated the matter set up in said bill, and said bill does not state facts sufficient to authorize a court of equity to review the said decision of the Land Department of the United States."

The objection is found in section 9 in the joint and several demurrer, page 81, as follows:

> "The Secretary of the Interior having decided that Robert J. Hackley, his heirs and legal representatives, had not conformed to the provisions of the act of Congress of the United States prescribing the requirements for the acquiring pre-emption rights therein, and the same being a mixed question of law and of fact, said decision of the said Secretary became final and cannot be reviewed by the courts."

It is submitted that this ground of objection is bad in that it constitutes a "speaking demurrer" by attempting to set up a fact as a basis for the objection, which does not appear upon the face of the bills and exhibits; but, on the contrary, is positively negatived by the allegations of the bills to which the demurrers are filed.

Shipman's Eq. Pl., p. 373.
Stewartson v. *Masterson*, 131 U. S., 151.

An examination of the bill and exhibits will show that nowhere does it appear that the Secretary of the Interior had decided that Hackley or his heirs and legal representatives had not conformed to the provisions of the act of Congress of the United States prescribing the requirements for acquiring of pre-emption rights in said land.

In the decision of the Commissioner of the General Land Office, rendered on December 10, 1890, filed as Exhibit "G," the Com-

missioner adopts in express terms the finding of facts as made by the Register and Receiver, making the opinion of those officers a part of his decision. At Record, page 27, in considering the claim of the Hackley heirs, after finding that Hackley made settlement upon the land, as contended in his behalf, and after setting out Hackley's claim, the Commissioner finds that he at all times up to his death contended that under the acts of 1813 and 1826 his prior right to purchase the land could not be questioned, whenever the reservation became useless or abandoned by the military authorities. After his review of the facts the Commissioner says:

> "This seems to us to entitle his claim, or that of his heirs who shared with him the privations of a frontier life, to serious consideration, and believing that Hackley made entry in good faith and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, we consider his claim superior, in the absence of an adverse claim, to the claims made after the abandonment of the fort in 1883."

At page 34 the Commissioner further finds that:

> "Hackley's settlement antedates all other claims, antedates the selection of a site for the cantonment; antedates the reservation. He appears, in fact, to be the first white man who ever lived on this land. He unquestionably is fully protected by the act of 1826, that of 1858, and that of July 5, 1884. He meets the requirements of the first proviso of the second section of the latter act."

At page 35 the Commissioner says:

> "I have, therefore, rejected all the claims to this tract, and to each legal subdivision thereof, with the exception of that of the heirs of Hackley, who will, if this decision become final, be allowed to make entry under section 2269, Revised Statutes, U. S."

In the opinion of Secretary Noble, Exhibit H, at page 42, the Secretary says:

> "The local officers first considered the claim of the heirs of said Hackley, and found that said R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1824, under the provisions of the act of Congress

approved February 5, 1813, and April 22, 1826; that said Hackley never relinquished his claim to said land; that Hackley made entry in good faith, and for the purpose of securing a home, under said acts of 1813 and 1826."

And, page 45, the Secretary further states with reference to the Hackley claim:

> "The facts relative to his settlement do not appear to be disputed. He went upon the said land in 1823 and 1824, prior to the selection thereof for a military site by Colonel Brooke, and was removed therefrom by the military forces in possession of the reservation in March, 1824; that in 1835 he filed in the local office at St. Augustine, Florida, proof in support of his claim; and afterwards, on November 21, 1843, he filed in the Newnansville Land Office, same State, a notice that he claimed 'right of pre-emption to the tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved May 22, 1826'; that in 1845 said Hackley died in Tallahassee, in said State, where he continued to reside after being removed from said land. On October 14, 1887, the administrator of the estate of said Hackley applied to purchase said lands, which application was rejected because the land applied for was embraced in said reservation. Upon a subsequent hearing the local officers found that Hackley had a prior claim, and you awarded all the land in said reservation to his heirs."

The Secretary then proceeds to consider the propositions of law involved in the discussion of Hackley's rights, and decided adversely to the Hackley claim upon conclusions of law.

In the opinion of Secretary Smith, rendered July 24, 1894, as Exhibit J, p. 58, the Secretary says:

> "It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1824, and the said Hackley never relinquished his claim to said land; and that he made settlement in good faith, so far as the record discloses, for the purpose of securing a home."

The Secretary then proceeds to consider the Hackley claim purely upon questions of law, and upon conclusions of law decided adversely to said claim.

It will thus be seen that nowhere in the opinions rendered by the different officers of the Interior Department does it appear

that the Secretary of the Interior found, as a matter of fact, that Hackley or his heirs had not complied with the provisions of the statute; but that, to the contrary, they have in each case adopted the finding of the Register and Receiver, to the effect that Hackley did perform all the acts necessary to a compliance with those statutes, and decided upon propositions of law that the legal representatives of said Hackley were not entitled to said land.

All of the statements above set forth in the bill and exhibits are admitted by the demurrers, and the demurrants are not permitted to set up a statement of fact adverse to the facts so alleged.

This specification is, therefore, bad as a "speaking demurrer."

Nor can either of the specifications of demurrer now under consideration be sustained on its merits.

The law is settled beyond controversy by a long line of decisions that the courts have jurisdiction to review the decisions of the officers of the Land Department on questions of law.

Cunningham v. *Ashley,* 14 How., 377 (14–162).
Barnard v. *Ashley,* 18 How., 43 (15–285).
Garland v. *Wynn,* 20 How., 6 (15–801).
Lindsey v. *Hawes,* 2 Black, 554 (17–266).
Johnson v. *Towsley,* 13 Wall., 72 (20–485).
Lee v. *Johnson,* 116 U. S., 48.
Quincey v. *Conlan,* 104 U. S., 420.
Rietor v. *Gibson,* 111 U. S., 276.
Sparks v. *Pierce,* 115 U. S., 408.
Johnson v. *Dillon,* 34 Fla., 130.

In *Johnson* v. *Towsley,* 13 Wall., 72, which is a leading case upon this point, and cited in all subsequent decisions where the question has arisen, the decision of the court is stated in the syllabus as follows:

> "Courts of equity have the power to inquire into and correct mistakes, injustice and wrong in judicial and executive action, when it invades private rights.
>
> "When officers of the Land Office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department.
>
> "But when they, by misconstruction of the law, take from

a party that to which he has acquired a legal right, the courts have power to give relief.

"This court will refuse to interfere by mandamus or injunction with officers having charge of settling public lands in the discharge of their duties, so long as the title remains in the United States and the matter is rightfully before those officers for decision.

"But after the title has passed from the government, and the question becomes one of private right, courts may inquire whether the party holding that title should hold absolutely as his own, or as trustee for another."

These principles, which have been affirmed time and again by the Supreme Court, are not controverted by any of the authorities cited by counsel for the demurrants, but are supported by them. We have already quoted at length from *Lee* v. *Johnson*. In *Quinby* v. *Conlan*, 104 U. S., 420, the court held:

"The courts cannot exercise any direct appellate jurisdiction over the rulings of officers of the Land Department, nor can they reverse or correct them in a collateral proceeding between private parties.

"It is only when those officers have clearly misconstrued the law and denied to parties their rights, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can interfere and refuse to give effect to their action."

It is respectfully submitted, therefore, that the questions raised in the case at bar are purely questions of law, and the demurrers on this ground are not well founded.

III. Objection that the Bills are Vague, Insufficient and Indefinite.

This objection is found in the separate demurrer of S. Y. Finley, section 2, pp. 83, 84, as follows:

"Because said bill of complaint, and amendment thereto, are vague, insufficient and indefinite, and do not state facts sufficient to authorize a court of equity to take jurisdiction in said cause, and to grant the relief prayed for against the defendants or any other relief."

This ground, which appears to be a *pro forma* objection, is general, and does not specify in what particular the bill is vague, insufficient or indefinite. We respectfully submit that the bill and exhibits set up clearly, specifically and at length all the facts upon which complainants base their right to an equitable interest in the land in controversy. This is all they are required to do. Anything further would be bad pleading.

Shipman's Eq. Pl., 323, *seq.*
Story's Eq. Pl., secs. 252 and 253.
St. Louis v. *Knapp Co.*, 104 U. S., 658.

It is difficult to conceive how bills could be more definite and certain without entering into that detail of statement which would cause prolixity and confusion, which should always be avoided by the pleader in equity.

IV. The Objection that There is no Allegation of Such Facts as Establish Fraud or Collusion Between the Defendants.

This objection is found as section 3 of the separate demurrer of S. Y. Finley, page 84, as follows:

> "Because said bill does not show any fraud, or knowledge of fraud, mistake or illegality on the part of the defendant or his grantors, as against said complainants, or any facts constituting a fraudulent collusion to injure the complainants."

In reply to this objection, it is only necessary to remark that the complainants do not base their right to the relief prayed for upon the ground that there has been fraud. This feature of the case has been hereinbefore more particularly discussed in distinguishing between cases based upon errors of law, as in the case at bar, and those based upon fraud.

The charge of collusion is made in connection with the conveyance to the defendant, Finley, whom the bill alleges was counsel for the patentee before the Interior Department, and specific allegation is made that the conveyances through which he claims were without real, legal or valuable consideration. (R., pp. 15 to 20.) Admitting this statement to be true, the charge of col-

lusion is proper, and the sole purpose of this charge and of these allegations in the bill is to show that the parties holding under conveyances made by the patentees took the property without real or valuable consideration, and with full knowledge of the rights of the complainants, and, therefore, a court of equity would be justified in declaring them to be trustees for the legal title which is vested in them, and requiring a conveyance of that title to the complainants, should the court be of opinion that the patents should have been issued to the complainants instead of to the patentee.

It is respectfully submitted, therefore, that there being no charge of fraud in the bill, the complainants are not required to allege facts which constitute fraud, and that the facts set out with respect to these conveyances, and admitted to be true by demurrer, are sufficient to support the charge of collusion as made by the bill only in connection with the conveyances, and not in connection with the original patent.

V. The Objection that the Defendants are Bona Fide Purchasers for Value, Without Notice.

This objection is expressed in sections 10 and 11 of the joint and separate demurrers of the defendants other than Finley, page 81, as follows:

> "*Sec.* 10. The Honorable Secretary of the Interior of the United States having decided on March 8, 1898, as shown by Exhibit K to complainant's bill, that all of the defendants except Lizzie W. Carew, the sole heir-at-law of the original patentee, were innocent *bona fide* purchasers, as shown by the evidence before the Interior Department, and such fact became finally adjudicated, and cannot now be reviewed by the courts, and the bill in this cause as to all the defendants, except Lizzie W. Carew, should be dismissed.
>
> "*Sec.* 11. It appearing from the allegations in complainants' bill that patent issued on the 30th of January, 1896, and that the titles to all the defendants who purchased from Lizzie W. Carew were predicated upon said patent, such purchasers are *bona fide* and lawful in the absence of fraud, and complainants' bill should be dismissed as to all of the grantees of Lizzie W. Carew."

In the separate demurrer of S. Y. Finley to the same bill, section 6, this objection is made in practically the same language as in section 10, quoted above (page —).

These specifications are bad in that they constitute "speaking demurrers."

Shipman's Eq. Pl., p. 373.
Stewartson v. *Masterson*, 131 U. S., 151.

The demurrants in these specifications have attempted to set up the fact that the Interior Department found in the evidence before it that the parties here made defendants were *bona fide* purchasers for value. It is submitted that there is nothing in the bill itself, or in the exhibits thereto, to support this contention. The only statement in any exhibit filed with the bill which refers to this subject at all is found on page 74, opinion of the Secretary, on the Bilbie petition, in which, after stating that it appears from affidavits and exhibits in the department, that nearly all the land patented has been sold and conveyed, the Secretary says:

> "The presumption is that such parties are innocent purchasers for value, and without notice of any defect in the title of the patentees, on account of fraud or other infirmity."

This holding could not bind the complainants, as they were not parties to this proceeding, besides which no specific mention is made of the defendants other than Mrs. Carew, nor is it stated who were the innocent purchasers. The question was not before the Secretary for decision, *nor within his jurisdiction.*

Admitting, however, this presumption, where nothing to the contrary appears, yet in the cases under consideration the presumption is overcome by the express allegations of the bill, which allegations are admitted on demurrer. In the bill the complainants have alleged specifically the conveyances to the various defendants other than defendant Carew, and set out the consideration upon which those conveyances were made, which in every case was merely nominal, ranging from one to ten dollars.

The complainants have further alleged, after making these specific allegations, that the conveyances were without real, legal or valuable consideration, and that the parties, both grantors and

grantees, had full knowledge of the rights of the complainants in said land. Here we have positive allegations of want of sufficient consideration to support the conveyances of large tracts of valuable land, followed by other positive allegations that the conveyances were without real, legal or valuable consideration, and that the grantees thereunder took with full notice of the rights of the complainants; which allegations negative in positive terms and overcome any presumption, if any exists, that the defendants are *bona fide* purchasers for value without notice. It is respectfully submitted, therefore, that not only is this demurrer open to the fatal objection that it is a "speaking demurrer," but it cannot be maintained in the face of the positive allegations of the bill.

VI. Objection that the Complainants are Precluded from Relief by Reason of Laches.

This objection is stated in the 4th specification of the demurrer of S. Y. Finley, page 84, as follows:

> "Because said bill shows such laches as to preclude a court of equity from granting the relief prayed, or any relief against this defendant."

It is well settled by the authorities that there is no general rule to guide the courts in deciding what does or does not constitute laches; that the question is one to be determined by the court in the exercise of its sound discretion, and in the exercise of this discretion the court must consider all the facts and circumstances of the particular case. Thus in the case of *Brown* v. *County of Buena Vista*, 95 U. S., 157, 160, the Supreme Court says:

> "But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court."

So in the case of *Twin Lick Oil Co.* v. *Marbury*, 91 U. S., 587, 591, the same court says, in speaking of what is a reasonable time in which to bring a suit:

> "This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question."

See, in this connection, the case of *Amos* v. *Campbell,* 9 Fla., 187, where the Supreme Court of this State held that "there is no rule defining what *lapse of time* will bar a purely equitable demand. Each case depends upon its own circumstances." And refused to apply the doctrine of laches where a complainant had slept on his rights for a period of fifteen years.

In the leading case of *Sterndale* v. *Hankinson,* 2 Simons, 398, the vice-chancellor, after laying down the principle that as a general rule a court of equity, while not bound by the statute of limitations, will apply the period fixed in such statute, says:

> "Where the circumstances of the case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it."

While, as shown by the above authorities, the question of the application of the purely equitable principle of laches to bar a plaintiff's right is entirely within the discretion of the court, yet it is the general rule with courts of equity to adopt the analogy of the statute of limitations as a limitation upon suits of equity of a similar character, though if the application of this limitation be inequitable the courts will not apply it.

The leading case upon the subject is that of *Elmendorf* v. *Taylor,* 10 Wheat., 152, which was a suit identical in character with those now under consideration, being a bill in equity to declare a trust and require the conveyance of real property. In the opinion by Chief Justice Marshall, pp. 168 to 177, the principle of the limitation to suits in equity is discussed at length. In that case no question was raised as to the application of a shorter period of limitation than that provided by statute for an action of ejectment; but the court considered whether or not it would apply the period fixed for an action at law to recover real property to a suit of the character under consideration. The court, after a complete review of the authorities, reaches the conclusion expressed in its decree, as follows:

"And this court is further of the opinion that in cases of adversary title, such an adversary possession as would bar an ejectment, did the plaintiff possess the legal title, constitutes also a bar to a bill in equity."

In the case of *Baker* v. *Whiting*, 3 Sumner, 45 (2 Fed. Cas., 495), Mr. Justice Storey, in delivering the opinion of the court, says:

"But, what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill, and I apprehend that in case of a trust of lands *nothing short of a statute period which would bar a legal estate or right of entry would be permitted to operate in equity as a bar to an equitable estate.* This doctrine seems to be admitted by the authorities ever since the great case of *Cholmondeley* v. *Clinton*, and it has been repeatedly acted upon in the Supreme Court of the United States." (Italics ours.)

In *Dugan* v. *Gittings*, 3 Gall, 138; 43 Am. Dec., 306, the court holds:

"A court of equity, in applying the statute of limitation analogically, would not permit the claim of a party to real property to be affected by any devolution of time *short of that which would have barred him at law in an action of ejectment.*" (Italics ours.)

See, to the same effect:

Hall v. *Russell*, 3 Sawyer, 506.
Manning v. *Hayden*, 5 Sawyer, 360.
Taylor v. *Holmes*, 14 Fed. Rep., 498.
Oakland v. *Carpenter*, 13 Cal., 540.
Love v. *Watkins*, 40 Cal., 547, 570.
Note 12 Am. Dec., 371, where the cases are collated and reviewed.

It is submitted that the authorities above cited (and numerous others might be produced to the same effect) establish the propositions that the application of the principle of laches to suits of equity is within the discretion of the court, and it is only applied in cases where justice and good conscience demand that it should

be done; that where the principle is applied at all, the analogy of the statute of limitations is adopted; that in suits in equity to declare the legal title to land to be held in trust and require a conveyance, the courts in applying the principle of laches, if it is applied at all, adopt the period of limitation fixed by statute upon actions of ejectment, and that no shorter period is applied.

The statutory period of limitations upon actions for the recovery of real property in Florida is seven years (Rev. Stats. of Fla., Sec. 1287–1288). The patents in the cases under consideration were issued to the defendants in 1896. These suits were brought in 1900, only four years after the right of action accrued, and three years within the statutory period of limitation. These facts, in the light of the authorities cited, constitute a complete answer to the contention that the doctrine of laches is applicable to this case. This position, however, is even stronger when the facts and circumstances of the cases at bar are considered.

It appears from the allegations of the bill that from early in the year 1835, as soon as the land office was opened in Eastern Florida, and communication with the same could be had, down to 1845, the date of his death, Robert J. Hackley continually and persistently asserted his right to the land in controversy; that subsequent to that date his legal representatives attempted to have their rights perfected in Congress and before the Interior Department, and were active and diligent in the prosecution of those rights before that department from the time the matter was referred to the Register and Receiver for a hearing until the patents were issued in 1896.

The bill also shows that the complainants are scattered from California to New York, and many are residents of Virginia. As a result, it necessarily required time and correspondence for the parties to decide what action they would take upon the adverse decision of the Interior Department, and to make their arrangements to enter upon expensive litigation.

It further appears from the allegations of the bill that almost immediately after the decision of the Secretary of the Interior awarding the lands to the present patentees, and the issuance of the patents thereon, James W. Bilby and other persons residing on this land filed a petition before the Interior Department alleg-

ing that the issuance of the patents had been secured by fraudulent means, and praying that the United States would institute suits to have the same cancelled and set aside. This petition was pending until 1898, when the decision was rendered declining to request the Attorney-General to institute such proceedings. So long as this petition was pending before the department, the question as to the legal title to this property was unsettled, and it would have been unwise on the part of the complainants to have instituted suits in court to require the patentees to convey the legal title to them until the question as to the validity of the patents under which the defendants held legal title had been finally settled by the Interior Department. If the decision of the Interior Department had been in favor of Bilby and his co-petitioners, proceedings would doubtless have been instituted by the United States Government to annul and set aside these patents, and if the complainants had immediately upon the issuance of the patents, while this Bilby petition was still pending, instituted their proceedings in this court to have the trust declared and the legal title to the property conveyed to them by the patentees, they might at the end of their litigation, if successful, have been met with the fact that by proceedings on the part of the government the patent had been cancelled and legal title revested in the government, and have found that all their litigation, expense and trouble had been for nothing.

But little over two years—1898 to 1900—elapsed from the decision in the Bilby case to the commencement of these proceedings, surely not sufficient time to constitute laches.

It may be observed, however, that a complete answer to this ground of demurrer is found in the fact, as set out in the bill, that many of the complainants are infants. The doctrine of laches cannot be applied by a court of equity so as to defeat the rights of infants, and the demurrer in this case being to the whole bill, upon this ground alone it is bad.

Whether tested by analogy of the statute of limitations in bar of actions for the recovery of real property, or the peculiar facts of this case set up in the bill, the objection of laches is not well taken.

VII. Objection that the Suits are Barred by the Statute of Limitations of the State of Florida, Paragraph 4, Section 1294, Revised Statutes of that State.

This objection appears in the thirteenth specification of the demurrer of Lizzie W. Carew and others, p. 81, as follows:

> "It appears from the allegations of complainants' bill that patent issued for the lands involved in this suit to Edmund S. Carew, on the 30th of July, 1896, more than four years before the filing of complainants' original bill, and this suit is barred by the statute of limitations of the State of Florida." (Par. 4, Sec. 1294, of the Rev. Stats. of the State of Florida.)

Substantially the same objection appears in the fifth specification of demurrer of S. V. Finley, p. 84.

Before entering into a detailed discussion of the statute, it may be well to call attention to the well-established principle that in purely equitable suits, such as those now before this court, a court of equity will, or will not, apply the statutory period of limitation as the demands of justice may require. This is particularly true as to the courts of equity of the United States as distinguished from the State courts.

The general doctrine is well stated in the leading case of *Sterndale* v. *Hankinson*, 2 Simons, 398, in which the Vice-Chancellor said:

> "The other fallacy is that the statute bars a suit in equity, which it does not, but as courts of equity will not entertain stale demands, they have thought proper to adopt the limit of six years in analogy to the statute, and pleas of the statute are admitted in these courts by analogy only. *Where the circumstances of the case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it.*" (Italics ours.)

In *Buckingham* v. *Ludlum*, 37 N. J., Eq., 137, 146, the Supreme Court of New Jersey, in discussing this question of the application of the statute of limitations to purely equitable suits, said:

> "It may safely be said, then, that after the partnership assets were in court the remedy of the creditors of the firm

> against them was exclusively equitable. To such remedies the statute of limitations does not apply. Courts of equity are not within the terms of the statute, and while they follow it by analogy, and have adopted as a rule the limit of six years in analogy to the statute, as the time within which a suitor in certain cases must bring his action, yet they do not adhere to it so inflexibly as to feel obliged to deny relief to every suitor who asks their aid after the expiration of the limited time."

Quoting with approval the case of *Sterndale* v. *Hankinson, supra.*

In the case of *Sullivan* v. *Portland, etc., Ry. Co.*, 94 U. S., 807, 811, the Supreme Court of the United States says:

> "Every case is governed chiefly by its own circumstances. Sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

But even if this statute were applicable to a purely equitable suit in one of the State courts of Florida, it is submitted that it would not be binding in the equity courts of the United States. The courts of the United States are not bound by statutes of this character, but administer equity jurisdiction in accordance with the rules and principles which formerly governed the High Court of Chancery of Great Britain, a jurisdiction which is entirely separate and distinct from the States in which such courts may sit.

In *Kirby* v. *Lake Shore, etc., R. R.*, 120 U. S., 130, 137, Mr. Justice Harlan, in discussing statutes of this character, after laying down the general rules as to the independence of the equity jurisdiction of the courts, says:

> "They are peculiarly applicable to a local statute which if followed would impair the power of the United States to enforce the settled principles of equity in suits of which they have, by the constitution and laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision in

trials at common law the laws of the several States, except where the constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction and equity cannot be impaired by the local statutes of the different States in which they sit.

"In the *United States* v. *Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said that as the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the States. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts of the United States, when he observed that the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisprudence throughout the whole of the United States without regard to State laws. On page 138 the learned judge further says, If the legal remedies are sometimes modified to suit the changes in the laws of the State, and the practice of their courts, it is not so with the equitable. The equity jurisdiction of the courts of the United States is the same that the High Court of England possesses; it is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union."

In the case of *Tice* v. *School District*, 17 Fed. Rep., 283, a suit was brought in the United States Court to set aside a judgment at law, and for a new trial, on the ground of surprise at the trial and newly discovered evidence. The statute of limitations in that State (Nebraska) provided that where the grounds for new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of receiver, or decision was made, the application may be made by petition filed as in other cases, etc., but "no such petition shall be filed more than one year after the final judgment was rendered." The district judge denied the petition on the ground that this statute was applicable. The Circuit Court set aside the order dismissing the bill, and, in discussing this question, said:

"Our jurisdiction in chancery is not derived from or limited by State laws. The rules governing its exercise are the same in all the States, and are according to the practice

> of courts of equity in the parent country, as distinguished from courts of law. It is a jurisdiction conferred by the Constitution of the United States and the acts of Congress, and if it could be controlled or varied by State legislation it could be extinguished by the same authority. This proposition was strongly stated by the Supreme Court of the United States in the early case of *Robinson* v. *Campbell,* 3 Wheat., 218, and has since been repeatedly recognized by that court. It is true that the Federal courts of equity usually follow by analogy State statutes of limitation, but they will not do so if the effect of such statute in any case is to limit their general chancery jurisdiction."

In *Bisbee* v. *Evans,* 17 Fed. Rep., 474, the Circuit Court for the District of Kentucky, in discussing the statute of limitations of that State, said:

> "This, however, does not control this court. Courts of equity in the State allow the bar of the statute of limitations in obedience to the statute, but United States equity courts apply the statute by analogy, and not in obedience to it."

The court in that case overruled a demurrer based upon the contention that the right was barred by the statute.

But even where the courts of equity of the United States do by analogy apply the statutory period of limitation to purely equitable suits, they adopt the period fixed by statute for actions most nearly analogous to the case which may be under consideration; *i. e.*, in a suit to have the title to real property declared to be held in trust, and to require a conveyance, the period of limitation fixed for actions for the recovery of real property is applied, as being most nearly analogous in nature and purpose to the class of suits referred to.

The authorities upon this proposition have been noticed in discussing the question of laches, but may be again briefly referred to. As we have seen, the case of *Elmendorf* v. *Taylor,* 10 Wheat., 152, is a leading case in point, and there Chief Justice Marshall, after an elaborate review of all the authorities, held that a court of equity in a suit to declare a trust and require a conveyance of real property, would apply the period of limitation of twenty years fixed by the statute for actions of ejectment at law. This case and the doctrine there laid down has been followed by the

United States courts from that day to this, and has been reiterated time and again in the different State courts of the Union.

Lewis v. *Marshall,* 5 Pet., 470.
Peyton v. *Stith,* 5 Pet., 485.
Miller v. *McIntyre,* 6 Pet., 61.
Coulson v. *Walton,* 9 Pet., 62.
Boone v. *Child,* 10 Pet., 177.
Beaubien v. *Beaubien,* 23 How., 190.
Hall v. *Russell,* 3 Sawyer, 506.
Fussell v. *Hughes,* 8 Fed. Rep., 384.
Taylor v. *Holmes,* 14 Fed. Rep., 498.
Dugan v. *Gittings,* 3 Gill, 138.
Ward v. *Van Bokkelen,* 1 Paige, 100.
Paschall v. *Hinderer,* 28 Ohio, 568.

The cases cited above are mostly suits to declare a trust and require a conveyance of the legal title to real estate, as in the cases at bar, and they establish beyond controversy that in suits of this character if a court of equity in its discretion applies a period of limitation, it will adopt, by analogy, the statutory period fixed for actions of ejectment, or similar actions for the recovery of real property.

It is submitted, therefore, that the authorities cited establish three propositions:

(1) That the statute of limitations has no application to courts of equity, and that the courts will not apply the statutory period of limitation where it is contrary to equity and good conscience to do so.

(2) That this is peculiarly true of the equity courts of the United States, and that they will not apply the period fixed in the State statutes of limitation, where it would limit their general equitable jurisdiction, or their power to administer justice in accordance with equity and good conscience.

(3) That in suits to declare a trust and require conveyance of a title to real property, if courts of equity follow the analogy of the statute of limitations for the State in which the property is located, they always apply to such suits the period of limitation fixed by the State statutes upon actions of ejectment, and similar

actions for the recovery of real property at law, and that no shorter period will bar a suit in equity.

In the light of these established principles let us examine the contention made by the demurrer with reference to the statute of limitations of Florida.

The Statute of Limitations of Florida.

Chapter 26, of Title 1, Part 2, of the Revised Statutes of Florida (1892) is divided into three articles: The first deals with provisions of the statute of limitations applicable to all classes of actions, the second with limitations applicable to actions for the recovery of real property, and the third provides the limitations upon personal actions and actions other than real. The sections of article 2, limiting actions for the recovery of real property are as follows:

> "1287. Actions for the Recovery of Real Property.—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within seven years before the commencement of such action."
>
> "1288. Actions Founded on Title to Real Property.—No cause of action or defence to an action founded upon the title to real property or to rents, or to service out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted or the defence made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within seven years before the accruing of the right of action or defence in respect to which such action is prosecuted or defence made, or unless it appear that the title to such premises was derived from the United States, or the State of Florida, within seven years before the commencement of such action; and the period of limitation shall not begin to run until the passage of the title from the State or the United States."
>
> "1292. Actions of Persons under Disability.—If a person entitled to commence any action for the recovery of real property, or to make an entry, or defence founded on the title to real property or to rents or services out of the same, be at the time such title shall descend or accrue either

(1) within the age of twenty-one years, (2) insane, (3) imprisoned, the time during which said disabilty shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making such entry or defence, but such action may be commenced, or entry or defence made, within the period of seven years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defence made after that period."

Article 3, dealing with personal actions, contains numerous provisions embraced in section 1294, fixing the limitations upon certain classes of actions upon contracts, &c. Paragraph 4 of said section is as follows:

"4. WITHIN FOUR YEARS.—An action for any article charged in a store account, and any action for relief not specifically provided for in this chapter."

As will be seen by reference to the demurrers, it is contended that the language of the above paragraph covers the suit at bar. In support of their contention the demurrants rely upon the case of *Branch* v. *Cole*, 18 Fla., 368, which was decided in 1881–'82, ten years before the adoption of the Revised Statutes.

In 1872 the Legislature of Florida enacted a statute of limitation, of which the first nine sections dealt with actions for the recovery of real property; sections 10 and 11 restricted the time within which various actions for the recovery of personal property might be instituted. Section 12 provided: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action has accrued." It was under this statute that the case of *Branch* v. *Cole* was decided. That case held that a suit in equity claiming dower and mesne profits, was not an action for the recovery of real property, based upon seizin or possession of the plaintiff, her ancestor, predecessor or grantor, but that such a suit was "an action for relief not hereinbefore provided for" within the meaning of the twelfth section of the act of limitations of Florida, then in force. Mr. Justice Westcott, delivering the opinion of the court, page 378, expressly bases the decision upon the fact that the said Act of limitations was passed

when the Code of Procedure was in force, which abolished all distinction between actions at law and suits in equity, "by which the legislative intent and the scope and effect of this section must be controlled." He also calls attention to the fact that "under the Code the appropriate method to assert such right" (being that under consideration) "was a civil action by complaint." The right sought to be enforced was a *statutory,* not an equitable right.

The fact of the Code of Procedure being in force at the time of the passage of the Act of limitations of 1872, as governing the interpretation of that act is also made to appear in *Browne* v. *Browne,* 17 Fla., 619.

The Revised Statutes of Florida, above referred to, which contain the statute of limitations now in force, was a revision of the laws of a general nature. It was enacted by the Legislature of 1891, and was published and went into effect in 1892. This revision made many changes in the statute of limitations as it had existed by the act of 1872. Among others, the language of section 12 of the act of 1872 was changed. And instead of this section applying to limitations generally, as by the act of 1872, it was not embraced in Article I. of the chapter of the Revised Statutes, applying to all classes of actions, nor in Article II., applying to real property, but was made a part of Article III., which deals exclusively with personal actions.

The act adopting the Revised Statutes repealed every statute of a general nature enacted by the State or Territory of Florida not included in the Revised Statutes. The chapter on limitations of actions differs in many particulars from the act of 1872—the language of section 4, under consideration, varying from that of section 12, of the act of 1872—thus such section and act stood repealed and superseded by the adoption of the revision. As before stated, the *Code* had long since been repealed, and the reasons given for the decision in *Branch* v. *Cole* could not apply to the suit brought after the enactment of the present statute of limitation. That case construed a different statute under different conditions, and was decided upon its peculiar facts. It certainly can have but little if any weight in the face of the unbroken line of authorities to the effect that a court of equity, if it adopts the analogy of the statute of limitations in suits to declare

a trust and require the conveyance of real property, will adopt the period fixed for *actions of ejectment* to recover real estate at law.

Notwithstanding *Branch* v. *Cole,* we are satisfied that the Supreme Court of Florida, even under the act of 1872, would not have applied the limitation of four years to an action of the nature of the case at bar. This is manifest in *Sloan* v. *Sloan,* 25 Fla., 521, which was a bill in equity to remove cloud from title to realty, while not a direct decision, it is evident that the court considered the seven years' limitation as to realty as applying to that suit.

Henderson v. *Chairs,* 35 Fla., 432 was relied on by the appellees, in the court below, as affirming *Branch* v. *Cole.* The former case was a bill to compel the executors of an estate to pay money to the complainant as her dower interest in the estate, and did not involve a suit for realty. The suit was brought prior to the enactment of the Revised Statutes. *Branch* v. *Cole* is not in terms affirmed, but merely referred to as a decision on the statute of limitations applicable to actions for dower.

Section 1288 of the Revised Statutes, above quoted, provides that where title to land is derived from the United States the period of the statute of limitations shall not begin to run until the passage of the title from the United States.

Under the provisions of this statute, if the complainants could have brought an action at law founded upon the title to real property, the title having been derived from the United States, the period of limitation against them would have begun to run with the issuance of the patent, and the action would have been barred seven years from that date. In the case at bar the complainants, not having any legal title, cannot bring an action at law, but in suits founded upon their equitable title to real property, are contesting the title derived from the United States. It would seem, therefore, in the light of the authorities cited, to be too clear for extended argument that a court of equity, if it adopts the analogy of the statute, will adopt the period fixed by said section 1288.

But it is submitted that even if the statute of limitations were applicable to these suits, the demurrers would have to be overruled, because the bills show upon their faces that many of the

complainants are under the disability of infancy. By section 1292 of the Revised Statutes of Florida, quoted above, it is expressly provided that the statute of limitations does not run against persons under the disability of infancy.

It is well settled that where the statute of limitations is pleaded by demurrer to the whole bill, and the bill shows that any one or more of the complainants are under such disability that they are not affected by the statute, then the demurrer must be overruled. Thus in *Keowne* v. *Love,* 65 Texas, 152, 156, the Supreme Court of Texas says, in speaking of the defence of the statute of limitations in that case:

> "It appears, however, that they set up the same defence by demurrer, and that this was overruled. . . . The overruling of the demurrer was necessarily correct, for the demurrer went to the entire cause of action asserted by each and every one of the complainants, while many of them were shown by the pleadings to have been under such disabilities as would prevent the running of the statute as to them prior to the institution of this suit, even if, as against persons not under disability, the statute as to any part of the cause of action would have run from the time of the death of the administrator of Pope."

See also *Coney* v. *Horne,* 93 Ga., 723.

We will now briefly review the principal authorities cited by appellees, in the court below, on this subject.

Norris v. *Haggin,* 136 U. S., 386 (34–424), is a case appealed from California, which in no wise militates against our contentions, but on the contrary sustains them. In this case a bill was filed alleging that defendants, who were the agents and attorneys of complainant, procured from him by fraud, when he was not in his right mind, deeds, mortgages, and other instruments in writing, whereby they secured title to a large quantity of land, and praying for restoration of the property, etc. The court found that fifteen years had elapsed after the time that complainant's mind became restored before suit was instituted, that the statute of limitations for the recovery of real property in California was five years, and held that "a court of equity is governed by the analogies of the statute of limitations" and that "where the object of a

suit is to do what could be done at law, namely, recover possession of real estate, and the plaintiff is guilty of the laches which a court of equity regards equivalent to a statute of limitations, such unexplained delay is a bar to the suit."

Teall v. *Schroder,* 158 U. S., 172 (39–938), also a case from California, was a suit in equity against Schroder and three hundred and thirty-four other defendants, to enforce the transfer by them to complainants of certain lands, charging that defendants came into possession of them by fraud. Thirty-two years elapsed after the alleged fraudulent acts before suit was brought, during which time the property was conveyed to numerous persons, the defendants, or those under whom they claimed. Justice Field in his opinion says: "Section 19 of the Act of April 22, 1850, reads as follows: 'An action for relief not hereinbefore provided must be commenced within five years after the cause for action occurred.' This section applies specifically to actions for equitable relief. Other sections of the act provide for the limitations of actions at law."

He also quotes the provision of the Code of Procedure that a cause of action on the ground of fraud must be brought within four years after the action occurs. He holds that the suit must be dismissed under the statute of limitations of California whether in court of law or equity, and also from other facts which show that complainants were barred from all relief when the suit was brought. It is to be noted that California is a Code State having but one form of civil action.

Baker v. *Cummings,* 169 U. S. (42–711), has no application to the case at bar, it is a suit in equity to procure cancellation of sale of interest in certain fees of complaint to his former partner on the ground of fraud, and for an accounting: The court held that case was within bar of the statute of limitations of Maryland of three years from the discovery of the fraud.

Cleveland Insurance Co. v. *Reed,* 24 How., 284 (16–686), bill to enforce mortgage lien. Held to be barred by the Wisconsin statute of limitations, which provides that "bills for relief in cases of the existence of a trust not cognizable by the court of common law, and in all other cases not hereinbefore provided for shall be filed within ten years after the cause thereof shall accrue, and

not after that time." This provision specifically and exclusively applies to bills in equity.

St. Paul, &c., R. Co. v. *Sage*, 49 F. R., 315. Circuit Court of Appeals, 8th Circuit, Minnesota. Bill to recover lands conveyed by State of Minnesota to St. Paul, Stillwater & Taylor's Falls R. R. Co., which, it was claimed, the Hastings & Dakota R. Co., original complainants, were entitled to have had conveyed to that company by the State. Minnesota statute provides six years limitations to an action for relief on ground of fraud. The judge delivering the opinion expressed the view that this act applied to an action based on legal fraud involved in the refusal of a person who has become invested with the legal title to lands to convey the same to the real owner, or to account to him for the proceeds thereof in case the lands have been sold, and that the above limitation applied. But admitted that there had been a contrary holding by the Supreme Court of Minnesota, in construing the same statute, in *Burke* v. *Association*, 40 Minn., 506; 42, N. W., 479. The court further held the suit barred by laches of fourteen years. It is to be noted that all distinctions between actions at law and suits in equity have been abolished in Minnesota, and there is but one form of action.

Street v. *Rigney*, 107, F. R., 545, Court of Appeals 8th Circuit, thoroughly sustains our contention, holding that the limitations of ten years, barring actions to recover lands, applies to all actions, whether legal or equitable, and is applicable to enforce trusts in real property and actions to set aside deeds in fraud of creditors.

Without burdening the court with an analysis of some other cases cited by counsel for appellees on this point in the lower court, we submit that an examination of them will show that they are not in conflict with the contention of counsel for appellants in this behalf.

In conclusion on this subject it is submitted in the light of the principles and authorities above discussed, that the statute of limitations of Florida has no application to purely equitable suits such as those under consideration, especially where those suits are in the equity courts of the United States; that if a statute of limitation is applicable at all, the court will apply that provision

of the statute covering actions at law most nearly analagous to the suits under consideration, to-wit: actions for the recovery of real property upon which the statutory limitation is seven years; that even if the statute upon which the demurrants rely were applicable in these cases, the demurrers would have to be overruled, because they are demurrers to the whole bill, and the bills show upon their face that many of the complainants are under the disability of infancy, and against these the statute could not run.

Conclusion.

In our argument, which has been extended much beyond the limits contemplated, we have attempted to analyze, and to meet fairly, every proposition advanced by counsel for the demurrants in opposition to the claims of the complainants. We submit that the authorities cited, when applied to the facts of this case, establish our position that Hackley and his legal representatives acquired, by virtue of the settlement in 1823–'24 and subsequent acts, a vested right of pre-emption in the purchase of, or an equitable interest in, the land in question, upon the passage of the act of April 22, 1826, which right or interest related back to the date of settlement; that the perfection of this right into a legal title had been delayed, and the enjoyment thereof suspended, by the occupation of the land by the government of the United States, until it was restored to the public domain in 1883; that said right or title has never been forfeited by failure to perform the conditions annexed to it, and that said conditions have been performed both by Hackley and his legal representatives, in letter and in spirit; that the Interior Department, therefore, erred in its construction of the law and in its failure to award the patents for this land to the legal representatives of Robert J. Hackley, the complainants herein.

In every case there are equitable considerations which make "the atmosphere of the case," and which should appeal to the "conscience of the chancellor," and influence to a greater or less degree his opinion upon the points involved.

Passing from an analysis of the various positions to a view of the case as a whole, the untenable and inequitable character of the position of the demurrants, and the strong position of the complainants becomes even more apparent.

An examination of the Record will show that the Register and Receiver, the Commissioner, and the Secretary of the Interior, in the first decision rejecting the claim of Mrs. Carew, based that rejection upon the ground that it was but a fraudulent effort to secure this land for speculative purposes—a ground which is fully sustained by the evidence cited in these opinions and made a part of the record.

It was only by eliminating much of the most important evidence that Secretary Smith was enabled to recognize and establish this claim, which the Record shows is based upon a settlement under an agreement originally made with Senator Call, for the purpose of securing this property for the city of Tampa, which arrangement Carew subsequently repudiated and claimed the property for himself.

On the other hand, Hackley originally made his settlement, as is admitted by all parties, for the purpose of securing a home, when the land in question was a part of the dense wilderness. He belonged to that class of settlers who, in the language of President Buchanan, are to be regarded as "public benefactors"—the pioneers in the advance of civilization, a class which has ever had the peculiar consideration of Congress, and has been the beneficiaries of numerous acts of a remedial character—a class whose rights have always been protected by both the executive and judicial departments of government, in recognition of their valuable services to the country in opening up waste lands to cultivation and to settlement.

While readily recognizing the right of the government to occupy this land for military purposes, Hackley never for one minute relinquished his right to the home which he had thus established when such occupation ended, but by numerous appeals during his life-time to the proper authorities, sought to perfect his right, which might be enjoyed when the occupation by the government had ceased. Since his death, in 1845, his legal representatives have continued in their effort to perfect their right to the tract of land in question. The equity of this claim brought from Hon. William Windom, of the Committee on Public Lands, of the Senate, the following report in 1876:

> "The claim of Mrs. Hackley seems to be a good one. The only doubt seems to be that the government might have erected costly buildings on the land, and it is hardly right, in his opinion, to give the land to the claimant. He proposed to refer her petition to the War Department for action on this particular, namely, the value of the buildings put upon the land by the government during its occupancy as a military post."

In 1878, Hon. A. H. Garland, member of the Committee on Public Lands, of the Senate, made the following statement:

> "The department insists that the government needs the land for a reservation. The committee are of the opinion that Mrs. Hackley has a good equity, and should be paid something, but that she could not *yet* get this land."

The difficulties suggested in the Senate have since been removed by the restoration of the whole reservation to the public domain, and the removal of the buildings. The government is no longer interested, and the contest is between the legal representatives of Hackley, with all the equities in their favor, and the defendants, whose claims are based upon settlement made after 1883—a settlement which various officers of the government, whose opinions are found in the Record, have declared to have been based upon fraud.

The Register and Receiver and the Commissioner of the General Land Office (the officers to whose satisfaction the statute required that the legal representatives of Hackley should establish their claim) found that the complainants were entitled to the land, and were especially impressed, as their opinions show, by the equity of these claimants.

It was only upon technical questions of law, as to which we have shown they were in error, that the Interior Department and the court below were enabled to decide this case against the complainants.

We submit that both law and equity demand that the court should correct these errors and award to the complainants that justice which has already been too long delayed.

Respectfully submitted,

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OCTOBER 18, 1904.

APPENDIX.

APPENDIX.

(*Pre-emption Act of* 1826. *Congressional Debates* 1825–'26, *Volume 2, Part I., 19th Congress, first session, beginning Page* 1422.)

The bill giving the right of pre-emption in the purchase of lands, to certain settlers in the Territory of Florida, was taken up—Mr. Forsyth in the chair.

The bill having been read—

Mr. White, of Florida, said, if this were a subject introduced for the first time to the consideration of Congress, he should approach it with some embarrassment, not for the want of confidence in its justice, but, at the introduction of a new system of policy in the disposition of the public lands; and from a reluctance, which every one must feel, in proposing innovations on established law and usage. This is, however, no new proposition in the legislation of the country—it is coeval with the origin of our government; was practiced, previously, by the former Sovereign, in all the Colonies; is identified with our legislative history, and has been pursued, with unbroken continuity, with various, but unessential modifications, from the year 1788 to the present period. He did not perceive anything to justify a departure from it, at this time, either in the condition of the government or of the inhabitants of Florida. If there was anything erroneous in principle, defective in practice, or injurious in its consequences, it ought and would have been discovered and exposed long since; the fact, however, of its having received the sanction of all the administrations for upwards of thirty years, and of almost every successive Congress, is an undoubted argument in favor of its justice and policy; and it would be admitting the last sister into the Union most ungraciously, to deny her rights which the munificent legislation of the nation has conferred on every

other new State or Territory. Sir, I should not like to be the messenger of such unwelcome intelligence to a people proud to acknowledge the repeated evidences of your liberal and expanded policy; and who would not like to recur to so signal an instance of departure from precedent, so inconsistent with the liberal spirit that has characterized your legislation, and so blighting to their hopes and prospects. The policy of all the governments on this side of the Atlantic has been to extend their settlements as widely as possible, to attach the inhabitants to the country and their government, by giving them an actual share in the real property, that they might not, in times of difficulty, return the answer of the Roman people on Mount Aventine to the Ambassadors of the Senate. Pioneers and adventurers of new Colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many important benefits to the country, in increasing its facilities, extending its empire, and protecting its borders, have always been and ought to be rewarded. Influenced by these considerations, the governments of France, England, and Spain have made gratuitous grants of lands to their subjects, who improve, inhabit, and cultivate them. The exercise of this indulgence has been so universal that it is considered inseparable from the colonial state. The United States, recollecting the favors extended to themselves by the parent government, and animated by the same just and liberal policy, have not been less bountiful to their citizens.

A recurrence to the laws of the United States will demonstrate that the petitions of the people of Florida, upon which the Land Committee have reported this bill, are neither new or unreasonable, but that they have been sanctioned by numerous precedents. He conceived there were no reasons deemed sufficiently forcible to justify a departure from the system in Florida. Previously to making a particular reference to those laws, it might remove some obscurity, and obviate some objections, to notice a misapprehension of many gentlemen in regard to settlements on public lands. It has been alleged that the existing laws forbid settlements on the public lands, and denounce heavy penalties against all such intruders, who were located there without authority; and some call them squatters, which, so far as it is intended, as

either descriptive or derogatory, was entirely unjustifiable. These inhabitants are small planters, whose lands in the old States have been exhausted by cultivation, and who, animated with the laudable desire of improving their condition, and that of their rising families, have encountered all the hardships of penetrating to the borders of the country, disregarding the difficulties of the journey, and unappalled, either by the labors of the forest or the enemy in its bosom. Any imputations upon their motives, or question as to their right, would be the strongest censure upon our forefathers, who sought this continent, influenced by the same praiseworthy considerations. A more respectable population is not to be found in any of the States. If, however, sir, there was a law of the United States interdicting settlements upon the public lands, I could plead, as an excuse for them, the uniform legislation of Congress rewarding its violators, and quote the old maxim, *"Communis error, facit jus"*—he was fortunately, however, not reduced to such an alternative. The law does not prohibit such settlements, and he would show that the act of 1807, which was considered the basis of such exclusion, did not embrace this class of settlers; and, if it had, that law was practically repealed. That act, which is entitled, "An act to prevent intrusion on the public lands," provides that if any one shall take possession of, or attempt to survey lands ceded to the United States, he shall forfeit his claim, and the President may remove him by force. This law was passed not long after the cession of Louisiana to the United States, and its evident object was to prevent surveys of large claims, the validity of which were doubted, and to prohibit those having unlocated floating permits, from being surveyed and settled on the best plans of that rich territory, and hence they employ the phraseology, "forfeit his claim." The government was desirous of prohibiting by force, if necessary, the location of these floating and fraudulent claims, that the occupancy of them, after the change, might not be pleaded as a prescriptive right. Another consideration which probably impelled the enactment of that law, was to enable the President, in a summary way, to preserve the valuable timber, by the expulsion of intruders, without a resort to the tedious and protracted process of law, and the consequent destruction of the public

property in the meantime. It never was, and could not be, the intention of that law, or any other of the United States, to prohibit settlements upon the public lands. The Register was authorized to grant permits to settlers. The act of 1807 was re-enacted, in express terms, in that of the 26th of March, 1816—contains the same provisions, so far as the settlements were concerned, and superseded that act. This statute expired, by its own limitation, one year thereafter, in 1817, when an act was passed, obviously to remedy the defects of the other, and to provide more effectually for the same object. The necessity of one part having been dispensed with, in the adjustment of land titles, it was provided that the Secretary of the Navy, under the direction of the President, should lay off districts which might be useful for public timber, and, by proclamation, to prohibit intrusions on those reserved districts, under severe penalties; if any order of this kind has been made, or any district selected, and the public notified by proclamation, all who settled within the prohibited district would incur the imputation and penalty imposed by the act of 1807. Since the passage of the last act, there has been no authority given under the laws of the United States to Registers to grant permits, because none were necessary to authorize a settlement upon the public lands; they have, on the contrary, been rewarded by a privilege of purchase similar to what is proposed in this bill. This, however, gives as small a quantity as ever has been given, and smaller than has been accorded in many places, as a reference to the laws providing for the right of pre-emption will demonstrate. In Ohio, a grant of this kind was made to the United Brethren on the Muskingum; and one million of acres afterwards given to John C. Symmes, upon condition, which having failed, six hundred thousand acres were given to settlers at the government price, with the privilege of entering six hundred and forty acres by each individual. The same right was extended, by law, to the settlers at Gallipolis, and in the District of Cincinnati.

In Illinois, by an act of Congress, passed in 1814, after donations had been given by law, the right of pre-emption is given, up to February, 1813, of not less than one hundred and sixty, nor more than six hundred and forty acres—in Indiana, up to

1813, both subsequent to the law of 1807. In Michigan, to 1804, with other indulgences to the settlers. In Mississippi, after great liberality in granting donations, pre-emptions were allowed up to 1807, and the purchasers given to 1813 to pay for the lands. In Missouri, Louisiana and Arkansas, the same rights were given to settlers. It is manifest, sir, from a reference to these laws, that the system has been adopted and continued almost uniformly in all the States and Territories where there were public lands, and if it was inexpedient, why has it not been arrested before now? All that is solicited for Florida is what has been granted elsewhere. This bill does not provide to the same extent that others have; in Louisiana and Mississippi, these rights were given to settlers for ten years after the change of government. The country he had the honor to represent was surrendered in 1821; this bill only provides for four years instead of ten; in some others they were allowed three hundred and twenty and six hundred and forty acres of land, and, in most instances, time has been given for payment. By the terms of the bill under consideration, they have the right of purchase for one hundred and sixty acres, for which they pay cash. This, sir, is a most reasonable request, as is shown by the foregoing comparison; if it is granted, as it is an exercise of bounty, the people of Florida will not stop to inquire what has been done elsewhere, but offer their sincere benediction for the government that has protected their families in the enjoyment of their homes, in the formation of which they have expended their only means of purchasing in competition with others, attracted by their improvements.

Are there any circumstances or difficulties connected with the settlement of Louisiana or Mississippi, to distinguish them from, or give them a preference over, this Territory? If there was any difference in point of peril and privation, it was on the side of Florida. After the change of government, the present inhabitants travelled from the Southern States several hundred miles through the Creek nation, or around it, through forests, cutting roads and constructing bridges, swimming creeks and rivers, and, after their arrival, for the first two or three years, were under the necessity of purchasing provisions at three or four times the amount they now cost.

Is it equitable or proper, that men who have encountered all these difficulties, submitted to these dangers and privations, and furnished these facilities for others to get into the country, should be put into equal competition with those who have made no expenditures, and availed themselves of the conveniences of their more intrepid pioneers? Is it just, sir, that one who has, by improving the country, increased the value of all the contiguous lands, and whose labor alone has given additional value to the spot on which he has located his family, shall be expelled, without any equivalent, from his home, by affording to the ruthless speculator an opportunity to buy it over him? Sir, some have pretended to doubt the policy of these laws from the beginning. I would inquire of such, how would you ever sell these frontier lands without roads and settlers? If any gentleman supposes that, upon an enlarged view of this subject, the United States will lose by the passage of this law, he will be greatly mistaken, unless they avail themselves of the labor of those adventurous citizens, without a fair equivalent. The value above the government price is derived from their labor, and the means they have furnished in penetrating the country. See the returns of the sale in Tallahassee; refer to the price of lands in the States; when it sells for twelve dollars per acre, ten of that is derived from the improvement, because land in its vacant state requires that sum to improve it. I do not hesitate to believe that the land, in the state in which these settlers found it, was not worth more than the sum they are required to pay by this law. It is a sound principle, in politics and e[illegible]ics, that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labors of these individuals, cannot be denied; and what will be their reward if this law does not pass? Their means of purchasing have been exhausted in the improvements of the country and the high price of provisions; and the inevitable consequence will be, that they will be turned from their houses, forced from their plantations, by the rapacity of the heartless speculator, with but an inconsiderable augmentation to the treasury. You cannot conceive, sir, the distress that it will occasion. They have, on account of the causes enumerated, but moderate means. They cannot enter the lists of competition with

those who are attracted by their improvements, the result of toil and labor, in which they had no participation, and for which they feel no sympathy.

Mr. W. could not, in justice to the subject, dispense with the necessity of informing the House how these things were managed. A sale of public land is advertised; the sharpers of the adjoining States—strengthened by the aids of usurers and banks, clubbed together their funds—flocked to the country like vultures, at "death's prophetic knell," traverse all the roads made by the honest settler; survey the whole district; take notes of every well-improved place; ascertain whether there is a spot endeared to a planter, on account of its containing the bones of a wife, child, or friend; and when the sale begins, the planters are informed privately, that, unless they pay so much to this "holy alliance," their farms and houses will be taken from them. The unpleasant alternative is presented, either to tender the bribe or abandon the possession. If it is given, either in money or in bond, all others are forbidden to bid for the land, and it is purchased at the price proposed in this bill, from the United States, and perhaps the same sum to the company. Should it not be given, the land is purchased for a few dollars more than the means of the honest settler, who is sacrificed, and the public treasury augmented a few cents. It is to prevent this vile bartering, or the consequent injuries to those who will not engage in it, that this law is desirable. Such were the excesses to which these practices were carried in the southern part of Alabama, that their courts were crowded with suits upon notes of this description. Instances equally distressing have occurred, and will again occur, in Florida.

By the passage of this law, you save from ruin an industrious, enterprising class of men, who have confided in your munificence, from a knowledge of your long-continued legislation on the same subject. It is also important from a political point of view. The lands on our borders and frontiers should be occupied by men who are competent and willing to repel the first invasion of our country. Should this class be driven from the lands, and they were succeeded by the quarters of Southern planters and speculators, what will be our condition in time of war? It is impor-

tant that small planters should be encouraged, and a dense and efficient population invited and encouraged, at the limits of the Confederacy, devoted to the government, by a grateful recollection of its favors. One successful sortie of an enemy, and the occupation of a favorable point, might cost the government more than all the lands in a district would sell for to remove him.

In every view of the subject, precedent, good faith and policy, in my humble judgment, this law ought to pass.

Mr. Whipple said, he had some doubts as to the propriety of this mode of legislation. He did not, however, rise for the purpose of opposing the bill; but he objected generally to the extension of the pre-emption system. It would be recollected that provision had already been made, by donation, for all those who settled in Florida up to the time of its cession; but the present bill goes farther, and grants to those who settled on the public lands after the cession, the privilege of purchasing at the minimum price for a period of four years. He thought this course was impolitic, and that this right of pre-emption ought to be restricted because its practical tendency was to encourage the intrusion of unauthorized settlers on our public lands. Those settlers were in the habit of selecting the very best of the land, and of fixing themselves upon the soil, and when afterwards the lands were exposed for sale, they say it is unjust to eject us; we have made improvements; and they insist upon having the best and the richest of the land at the very lowest price the law will allow. For himself, he thought that this was a very questionable policy; but if the House were inclined to sustain it, he should make no opposition.

Mr. Owen observed that this was a proposition that certainly could not stand in need of debate. It was not at this time of day to be settled, whether this government will or will not pursue the course of policy to which the gentleman had alluded. It had already been adopted and long pursued. This very bill, after being last year sustained both by the Committee on the Public Lands, and by the Committee on Private Land Claims, passed the House. The policy was adopted long since, and the doctrine advanced by the member from New Hampshire might almost be said to be now universally exploded. The donation lands to which the gentleman

had alluded, were given to the former settlers in Florida on a principle of individual right. If they had not been conferred by this government, the settlers would have obtained a title from the government under which they formerly lived; it was, therefore, only an act of justice, and not of liberality. But, on the question of policy, he held an opinion directly the reverse of that which had been expressed by the gentleman from New Hampshire. He thought it was our true policy to grant to those who settled on the lands the right of pre-emption. It was their labor which gave value to the lands; without it they would have had none. He considered it wise to encourage those who might, with propriety, be termed the pioneers of a more dense population. It was they who, by braving the dangers and overcoming the difficulties of an unsettled country, opened the way for the introduction of capital and all the improvements of civilized existence. As to what the gentleman had said of their selecting the best points, even admitting it to be true, their number was comparatively few, and abundance of the best land would still be left. But, from his own experience, as having been himself one of these pioneers, he was disposed to believe that the fact was the very reverse of this. It was true that new settlers, if intelligent, selected those points which invited most advantages for a new settler; but, as they had to choose them in such a situation only as would admit of their sustaining themselves till they could make further progress in improvement, they were not at liberty to range through the whole of a body of public lands, and pick out those portions only which contained the most fertile soil. These settlers were, for the most part, already drained of all the money they had, by payments into the public treasury. Would gentlemen wish to deprive them of all their earnings? In Alabama, the proceeds of what they paid into the treasury was equal to the whole amount of staple commodities they had hitherto been able to raise. They had literally been laboring for the government, and the same state of things existed in Florida.

Mr. Cockey said, that his vote on this occasion would be regulated by one consideration alone: if it was proposed to extend a greater boon to the settlers in Florida than had been bestowed on those in other States, he should be opposed to the bill; if not, he should vote in its favor, unless some reason could be given.

Mr. Whipple replied, that the extent of time during which this right of pre-emption was given to settlers in other Territories, was greater than that now proposed. He wished to correct one misconception of the gentleman from Alabama. It was true that the bill had been reported to the House at the last session, but the chairman of the Committee on Public Lands, and two other members of that committee, were opposed to the principle on which it was founded. As to the donation rights in Florida, the gentleman was also mistaken. Commissioners were appointed, to whom the claims of settlers were to be committed; and, where the evidence in their favor was incomplete, if the Commissioners thought that the claim would be confirmed by the Spanish government, they reported in favor of them. Pre-emption rights went on a different ground. They were to be given to persons who had settled since the cession of the Territory was openly known, and who knew that the land on which they settled was public property, still, however, as the government of the United States has seen fit to grant such rights to others, he should not oppose their doing so in the present instance.

Mr. Scott said, that if this were to be the beginning of the pre-emption system, it was very possible that the Committee on the Public Lands would not be in favor of its adoption. But, when the right now to be given was compared with that which had already been given to others, he saw no reason why it should be refused to the settlers in Florida. In Missouri, the right of pre-emption originated in 1800, and he did not know a single instance where it had been refused. In Michigan, in Mississippi, and in Arkansas, the right of pre-emption was extended to ten years; but this bill gives it for five years only; and although it is admitted that they made their settlements contrary to the acts of 1804 and 1807, forbidding settlements on the public lands, yet the House had so far superseded the law as to give pre-emption rights to those who had violated it, and there was no reason why a difference should be made between settlers in one Territory and those in another.

Mr. Cook was about to address the House, when—

The Speaker suggested that, as there was no opposition to the bill, the debate was consuming time to no purpose.

Whereupon, the question was taken upon ordering the bill to be engrossed for a third reading, and decided in the affirmative.

And the House adjourned.

WEDNESDAY, February 22, 1826.

* * * * * *

The engrossed bill, "granting the right of pre-emption to certain settlers on public lands in the Territory of Florida," was read a third time; and the question being, "Shall the bill pass?"

Mr. Vinton said, that he was fully aware that a privilege similar to that now proposed to be conferred on these settlers in Florida, had already been granted to others not more meritorious than they. But, from his experience and observation as one of the members of the Committee on Public Lands, he was entirely satisfied that we must break down this system of pre-emption granting or it would break down the land system. The basis of that system, as originally intended, was that the lands ceded by the several States to the general government, should be parted with by sale only, and in this way regulate and direct the settlement of the country. Pre-emption and donation rights had, however, been granted for various purposes: some had their origin in the charity and sympathy of Congress; some for purposes of education; others for the encouragement of religion. Concerning this entire class, whatever might be his opinions as to the expediency or wisdom of such disposition of the public property, he should at this time say nothing: they rested on their own particular merits. But, said Mr. V., there is a class, both of donation and of pre-emption grants (and that class which embraces the case of the bill), which leads to consequences the most prejudicial to the interests of the country. These persons to whom you are now called upon to grant pre-emption rights, are naked trespassers, who, entering without a shadow of right, upon the public lands of the United States, selected the very choicest portions of those lands for themselves, and now come before this House, without even a pretense to any title whatever, and ask for countenance and reward from the government. Congress had passed laws forbidding all trespasses on the public lands; but, if it had

not, the natural principles of right, the universal law of property, forbid any man from appropriating public property to his own use, without the consent of government. The contrary principle, if pushed to all its legitimate consequences, would end in the annihilation of all public property, and the supervision of all government.

It was said yesterday, in the course of debate, that we are now bound to go on as we have proceeded, because we have extended this same benefit to others, not more meritorious, nor any less culpable, than these. But this fact, so far from being an argument in favor of passing the present bill is, with me, precisely the reason, and the strongest of all arguments, from the accumulating force of the example, why we should not pass it. We have, it is true, gone to a great length in this species of legislation, and, if we proceed much further in it, the system will have accumulated, from precedent, a force and impetus which cannot be resisted; and, because we have encouraged and rewarded trespassers, we shall be held obliged to encourage and reward them, so long as we hold an acre of public land. Let gentlemen recollect that, in the course of time, the whole of that vast region which lies west of the Mississippi, will come to be settled under the operations of the land system of this government. And I think, when this is duly considered, the House must be satisfied, that they have gone far enough already—that it is high time to stop and arrest this course, before it leads to the entire prostration of our landed system, by our people running over the country in the wildest and most irregular manner. It is idle to talk about the claims of trespassers. No trespasser has any claim. The gentleman from Florida is certainly mistaken when he says that this system has been acted on ever since the year 1788. In the course of the remarks made yesterday, in support of the bill, reference was had to pre-emption rights granted in Ohio to those who held under John Cleves Symmes, and to the donation granted to the Moravian settlers, and those in the Cincinnati district. The cases are by no means analogous, and furnish no just precedent for the present bill. The persons for whom this bill has been brought into the House, are trespassers; but those in the cases referred to, were not trespassers at all. The grant to the Moravians was made

at two different times. By the first act, three townships were given to certain Christian Indians, or for their benefit; and by the second act, ten thousand acres of land were given to the Moravians, residing at Bethlehem, in the State of Pennsylvania, in trust, as a fund to be devoted to the civilization and Christianizing certain Indian tribes. Were these Moravians trespassers on your public lands? They did not reside within hundreds of miles of them. They lived on their own property, in the heart of Pennsylvania. As to the pre-emption right granted to settlers on the tract sold to John Cleves Symmes, they rest wholly on equitable considerations. The United States sold a million of acres to Symmes and allowed him some time for the payment. He immediately went on to the tract he had purchased, and commenced selling out the land in lots to the settlers. These settlers honestly paid him for their land, and at very high prices too, he believed, and then improved it. Symmes afterwards failed in his contract, and, in consequence, the tract reverted to the United States; and these settlers might have been turned off—but the government, from principles of equity, allowed each settler to retain a lot of one hundred and sixty acres, at the price of two dollars per acre. Were these trespassers? They paid for their land twice, and had gone lawfully into possession. Did these men go roaming over the public lands, and settle where they pleased, upon the choicest land, without a shadow of title—upon land worth perhaps ten, twenty or thirty dollars per acre, and then come here for reward? No, sir; they were the *bona fide* purchasers of the land they held; and, as to the Cincinnati district, the grants there were to persons who had purchased from Symmes. It is, in fact, only a different part of the same case. Not a single instance could be pointed out, in Ohio, in which trespassers had received the smallest encouragement; much less, the bounty of government, for violating public property — it never had been asked for them—they had been left to their fate.

He would now say a few words as to the effect of this pre-emption right. It had its first rise in Louisiana and Missouri. He would begin, however, in Michigan, and passing through the Territories, would show what had been its consequences. Some four or five years ago, an act was passed granting donation rights

to all persons who had settled in the county of Mackinac, previously to the year 1812, on condition that they should prove that they had submitted to the laws of the United States, and acknowledge their allegiance to this government. It was known there were persons there who were aliens, and had served with the enemy during the war. The Commissioners, before whom those proofs were to be made out, by some extraordinary process of reasoning, came to a decision that no proofs should be required of this, on the part of the settlers, but that they would wait until some person came forward, produced a record of the conviction of the settlers, of the crime of treason, or some other violation of law. Some time after that, a military post was established at the Sault of St. Marie, which rendered this place of some importance—and what was the consequence? It appeared, last year, in evidence produced to this House, that, with the exception of one or two, all the persons who had received these donations were either British subjects, or had actually borne arms against the United States. And the leading claimant among them was the very commander who led the party that took the post at Machillimacinac, and let in that flood of Indians who covered our frontiers with blood, and who were the authors of some of the worst evils and barbarities of the late war. These Commissioners had recommended for confirmation, donation rights to those persons who were intended to be excluded by the law, within the very pickets of our military posts at that place; and the consequence was, that the troops were compelled either to purchase their wood of these persons, or to go a distance of two or three miles to obtain it, in this inclement country.

What was the state of this matter in Arkansas? A few years ago the United States made a treaty with the Cherokee Indians, by which that tribe was to receive a quantity of land (far beyond the public surveys or any known settlements) on the west side of the Mississippi, equal to that which they should give up on the east side of that river. But when the Indians, in compliance with this treaty, removed to the West, they found on the lands which had been ceded to them, hundreds of white settlers, who had settled there without any title, but who came into this House and demanded pre-emption rights; and, at the first session of

the last Congress, those rights were granted to them. A treaty was afterwards made with the Choctaws for a similar exchange of lands, and when they went to occupy the tracts assigned them, they found upon it settlers (which he had heard estimated to amount to between two and three thousand) who were unwilling to surrender the land on which they had trespassed; and during the whole of the last winter a delegation of that nation were in attendance at the seat of government, endeavoring to obtain the removal of these intruders, or make arrangements about them. Great difficulty and embarrassment was produced by their application, and I believe they had not been put into possession of their lands, or any adjustment effected.

In Louisiana these pre-emption rights were extended to ten years. A session or two ago, a gentleman from Louisiana had called for information, why a certain district of country in that State had not been surveyed and brought into market? The inquiry produced a long correspondence between the Surveyor-General of the district south of Tennessee and the Commissioner of the General Land Office, in which the former stated that Congress had so often extended the time for persons who held donations and pre-emption rights, and other claims, to make proof of them, as to render it impossible that those districts could be surveyed and brought into market; and in his correspondence the Surveyor-General minutely details a system of fraud and perjury, so extensive as almost to exceed credibility; and he concludes with same, that Congress have only to go on to pass one or two more laws, such as they have passed, and the residue of the lands belonging to the United States, in Louisiana, will not be of sufficient value to pay for the surveys. It is very easy in this way to grant away a whole State before we are aware of it.

In Florida, Congress had confirmed to settlers all the lands held by them at the time of the treaty, by which Florida was ceded, whether the settlers had title or not. A subsequent bill had been reported, by which six hundred and forty acres were proposed to be given to each of those who settled on the public lands, between the making of the treaty and the actual surrender of the territory to the United States, by which bill, which, in analogy to other acts, ought to pass, not less than eighty thousand

acres of public land would be given away. And now a bill is introduced, which gives to every man who may have run over the public lands for five years, and choosing out the best spots for himself, a right to pay for it at the minimum price. No man knows the number of these persons, and the gentleman from Florida has not undertaken to tell us. If anything, surely, was calculated to encourage the most wanton trespassers on our public domain—to break down our whole land system—it was this. They had retarded the sales of land, prevented the public surveys, interfered with the execution of our public treaties, and made war upon our military posts. These trespassers were ready, as appeared from these things, to throw a clog in the way of the movement of every wheel in the government. Our land system, as at first devised, was an excellent one. Experience demonstrated it to be framed on principles of practical excellence and expediency, and its effects have been highly beneficial to the public interests in Ohio, where it has been carried into strict and undeviating execution. But, if the course is persevered in, of granting these pre-emption and donation rights, that system will be virtually broken down. Congress are necessarily ignorant of what is taking place in that part of the public lands which lie beyond the portion surveyed. They do not know how many persons are engaged in seizing on the public property; and when they pass a bill like that now before them, they continue ignorant of the magnitude of the grant they have made, until they find some of its effects interfering with a subsequent movement of the government. They then become aware, for the first time, of the extent or amount of their own grants; but then it is too late to correct the error. Unless the government shall stop this encouragement to unlawful settlements, it is easy to foresee that the whole country, west of the Mississippi, was destined to be settled in the most irregular and objectionable manner, to become a prey to the yearnings of cupidity. He held it to be most important to the public good, that this whole business of settlement should be strictly regulated, and should be kept by the government under its own control. The inevitable effect of any other course would be a mischievous interference with our relations with the Indian tribes, and to put the settlement of the country entirely beyond the control of the

government, which ought to be known and regulated by policy. He had not made these remarks out of any particular hostility to the present bill, but from a general conviction of the impropriety and injurious tendency of this course of legislation—making the invidious distinction of rewarding one man for his trespass, and making another pay for his lawful possession. If the House are of opinion that the present course ought to continue, then they ought to pass the present bill; but, if they thought otherwise, they ought, undoubtedly, to refuse it. There were hundreds of trespassers on the public lands in Ohio; nor could he see why trespassers in Ohio or Indiana, in 1824, were not entitled to the same boon as trespassers in Florida, or trespassers in Michigan or Missouri. If any are to be encouraged and rewarded, remove all barriers; abandon all care of your public lands; and let all manner of persons enter upon them, and take what and where they choose. The consequence of which will be, one universal scramble for the whole country, to the Pacific, the evils of which to the government and the real settlement and prosperity of the country he should not attempt to depict.

Mr. White, of Florida, said, after the explanation which had been given of the principle and policy on which the bill now under consideration was founded, and no amendment having been proposed in Committee of the Whole, he could not have anticipated such formidable opposition on its final passage, and particularly from the gentleman from Ohio. He has said, it was time to break down the system, and denounced all who are intended to be embraced by this bill, as trespassers on the public lands; and has also asserted that their improvements cover all the good land of the Territory. He denied that either of the propositions were correct. The inhabitants, whose rights were intended to be secured by the passage of this bill, were not trespassers. The act of 1807, entitled "An act to prevent intrusion upon the public lands," was passed shortly after Louisiana was surrendered to the United States. There were, at that time, numerous unlocated claims, derived from the French and Spanish governments, founded on permits, requests, and floating concessions.

That act was intended to prevent the location and surveys of those incomplete titles, and at the same time to authorize the

President of the United States to preserve by force, if necessary, not only the domain, as this government acquired it, in the treaty with France, but also to invest him with discretionary power to prevent these locations of claims, many of which were considered invalid, and in the hands of those who did not intend to become citizens of the United States, the pretext for locating which, might have led to serious disturbances, in the condition that country was in at that time. Another consideration, which induced the passage of that law, was the preservation of the public timber on the lands of the United States.

It never was either the intention or policy of the government of the United States to prohibit settlements on their vacant lands; on the contrary, they have encouraged it, by a long-continued system of legislation, both before and after the act, to which, alone, the gentleman must refer, in pronouncing them trespassers. By the provisions of that act, the Register of the Land Office was authorized to grant permits of settlement to every American citizen who should apply for that privilege. Does this look like an intention of the government, at the time of the enactment of that law, to interdict settlements on the public lands? No, sir; neither that law, nor any other to be found in the statute book of the United States, will justify the statement of the gentleman.

In the act of 1818, the same provisions are incorporated, and the same permission given. That act expired in one year, and with it expired the only law then in force, or which has been subsequently enacted, to provide for granting permits to emigrants settling upon public lands. Every citizen, looking to the history of our legislation, feeling himself justified by established precedence, and in the absence of any prohibition, could settle anywhere on the public lands he thought proper, without incurring the imputation of trespassing, or the penalties of intrusion.

From the expiration of the act of 1816, in the year 1817, to the present time, there has been no law interdicting settlements on the public lands of the United States.

One of the great objects in the act of 1807, the preservation of the public timber, was provided for in another and better mode in 1817. He alluded to the law authorizing the Secretary of the Navy to reserve certain districts, which might, in the esti-

mation of the Executives, be useful for timber. With this enactment, and the final adjustment of land claims in Louisiana, terminated the law, and its necessity, under which the gentleman has considered it proper to denominate the citizens for whose benefit the law was intended, as "intruders and trespassers"—appellations which neither the law, nor the character of the inhabitants would authorize as appropriate or descriptive.

The gentleman says we have gone far enough; it is time to stop. Sir, he ought to have been here thirty years ago, when you were voting away such extensive donations to the State he represents; his arguments might have been more forcible then than now; but how does the account stand? Ohio has gotten all that she could ask, and it is time to stop; "the system is a bad one." Is this consistent with the quality and propriety that should characterize the legislation of this great nation? Ohio has been satisfied, and it is time to stop. The gentleman has attempted to explain how these grants were made to the State of Ohio; and, however ingenious he may be, and is capable of being, in the explanation, he cannot separate it from the present bill. One million of acres of land was given to John C. Symmes, upon certain conditions; they were not complied with; the land reverted to the United States, and, by law, six hundred thousand acres were given to purchasers at the government price. Yes, sir; by a law of Congress; and the gentleman attempts to explain it by saying, that they were purchasers under Symmes. Does this constitute any equitable or legal claim on the United States? Whatever might have been their demands on the original grantee, they assuredly had none on our government; and this act in favor of Ohio, was a bounty of six hundred thousand acres to them, on the same terms that this bill proposes to give one or two hundred to the settlers in Florida. If that gentleman could have been here, and by the power of his arguments prevented the passage of that law, he would have saved more to the government than will be saved by preventing the passage of this. But is this all that has been granted to Ohio? Sir, I have taken a note of all the laws which have been passed on this subject, and I find in that catalogue a grant to the "United Brethren," in Ohio, on the Muskingum; a grant to French settlers at Gallipolis; I find

also a grant to settlers in the Land District of Cincinnati. How much has been given to this favored State by all this munificent legislation, I have not taken the trouble to estimate; but since Ohio has received all that she can get, and is now rich and powerful, "it is time to stop." We have gone far enough. Sir, this logic may suit that gentleman, but it would sound most ungraciously in the ears of those I have the honor to represent; and would have been, some years ago, most unwelcome intelligence to those he now represents. The gentleman has told us of the abuses which have been practiced in Michigan and Louisiana under laws similar to the one under consideration. If such have existed, it is the misfortune of the government and its agents. It does not grow out of the system itself, and is no argument against its propriety. If he had read this bill, however, with his accustomed perspicuity, he would not have anticipated any such results as he has deprecated, in regard to the obstructions of the surveys.

This law cannot create any such inconvenience. It proposes to give to each settler a quarter section of land, at a specified price, to be bounded by sectional lines, if the surveys are completed; if not, to be bounded in the same way when they shall be completed; and, in this way, all the difficulties in regard to the surveys are obviated.

Sir, I do not ask for the people I represent more than has been conceded elsewhere, and it is difficult for me to perceive the faults or propriety of adopting an uninterrupted system, continued and uniform, sanctioned by nearly every Congress for thirty years, and when you reach the most exposed and frontier country of all your new Territories, say it is time to stop. We are told, however, that, by a law passed, and one in contemplation, eighty thousand acres are already given. The donations up to 1819, when the treaty was concluded, were only eighteen in number, as will be seen by the reports of the Commissioners; and I do not believe that the land, if sold, would pay for the surveying. The other class in contemplation, in Escambia county, where the greatest number reside, is of the same character. Those further east are more valuable; but admitting that the whole was good land, and add to it that proposed to be embraced by this bill, then

how will it compare with the six hundred thousand acres in Ohio? This, however, is not to be considered as purely a donation. By the regulations and ordinances of the Spanish authorities, in force in Florida, every person who settled in these provinces, and inhabited and cultivated the land for a particular number of years, was entitled to a gratuitous concession from that government; and by the treaty between Spain and the United States, the latter covenanted to confirm all title to the same extent that would have been confirmed under the Spanish government. The actual occupation under that government has always been considered as constituting an inchoate right, or equitable title, to be perfected in the same manner that such titles would have been under the Spanish government. Upon this principle, the United States have adjusted all the equitable, as well as legal claims, up to the change of government. Such were the laws for Missouri, Mississippi and Louisiana. The pre-emption laws have originated from considerations entirely different. I have shown, in the remarks I have the honor to offer in explanation of the objects of the bill, on yesterday, what was granted in Illinois, Indiana, Michigan, Missouri, Mississippi, and Louisiana. The gentleman says there are no recent instances, and that it ought to be stopped. In Arkansas, I think so late as the year 1823, or 1824, Congress passed an act giving pre-emption to all the settlers embraced in a treaty with the Choctaws, anywhere in that Territory—Cherokees, I am informed by the honorable gentleman from Arkansas—and in lieu of pre-emptions granted by an act of 1814. I thank the gentleman for the information, but it does not alter my argument. It is to show that this House have recently legislated upon this subject, and the extension that we contend for has been granted to Arkansas. The gentleman is equally mistaken in supposing that this law will cover all the good lands. The Indians were removed in the fall of 1824. This bill extended a right of preference in purchasing, to the first of January, 1825. It would be most surprising if many could have "inhabited and cultivated" the lands occupied by them until October or November, 1824, before the first of January, 1825. Besides, sir, if that were the fact, I contend that the government of the United States have no equitable or moral right to more than the lands are worth, in their unimproved state.

The gentleman has attempted to give an estimate of the lands and their value; let him look to the returns of the sales of unimproved land in the vicinity of the seat of government; it did not average two dollars per acre in the immediate neighborhood of Tallahassee. This sale will demonstrate what lands are worth in the woods. It is proper, however, to remark that there were other causes, which, in some measure, produced this result. If, then, sir, the lands on which these settlers lived are worth more at this time, from what is it derived? Their own labor; and is it just that the government should appropriate the labors of its own citizens to fill its coffers? Sir, it would be making slaves of the most deserving of your population. If the land is worth one dollar and a quarter, or two dollars, in the woods, and it costs ten dollars to clear it, is it fair, honest, or magnanimous, to take from the settler, encouraged to locate himself there by your laws, more than the value of the land in its unimproved condition? Look, then, to the sales in the woods in that country, and you have the estimate, and very near to the sum proposed to be given by this law. Mr. W. said he had attempted on yesterday to prove that the United States would make but little by the refusal to pass this law, whilst this deserving class of inhabitants, who have cut roads, constructed bridges, and felled the forests, would be placed at the mercy of a class of speculators, who are so well disciplined in the arts of their profession, and so familiar with the distress they have occasioned, that the people have as little hope of compassion as from an Inquisitor, or mercy from a Shylock.

It is impossible to prevent combinations at those sales. No matter what the demand is, to a certain extent it has and will be continued. By passing this law, the individuals who are embraced by it (and their numbers have been greatly exaggerated) will be secure, and the government have a fair equivalent for the land in the state they found it—when you take in connection the increased value of the land around their settlements, in consequence of the facilities they have created to get them, and the comforts and conveniences they afford to new emigrants. Whenever improvements are found to be valuable, the company of speculators, through their foreman, notify the farmers, whose

means of purchasing have been exhausted in the improvement of the country, and in purchasing every article at four times its present price, that unless he will pay so much to the company, they will bid for the land, against him. In this way the honest planter is obliged to compromise, and perhaps pay them as much as the government, or be sacrificed.

It is to prevent this, sir, that this bill is intended, and to reward the enterprise of your adventurous citizens, who have encountered all the perils and difficulties of a settlement in that country. Another consideration has great force in recommending the passage of this bill. Florida is your most exposed frontier, having an extensive seacoast. It is, therefore, the policy of the government to have as dense a population as possible, and every advisable means should be adopted for that object. Should the lands fall into the hands of speculators, or large planters, who will quarter their negroes near your borders and coasts, the consequences will be equally injurious to the population of the Territory and the security of the country. For these reasons, sir, and those I had the honor to submit on yesterday, I trust the bill may pass.

The question was then taken, and the bill was passed, and sent to the Senate for concurrence.